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SERIES XXXIII NO. 1

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE
Under the Direction of the
Departments of History, Political Economy, and
Political Science

MONEY AND TRANSPORTATION IN MARYLAND 1720-1765

BY

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PREFACE

This study forms the second instalment of what is intended to be ultimately a complete economic history of Maryland between 1720 and 1765. The first part, entitled The Land System in Maryland, 1720–1765, appeared in the Johns Hopkins University Studies, Series xxxi, No. 1. Work on the agricultural system is now under way.

The writer is under obligations to Professor Charles M. Andrews of Yale University, who read most of the manuscript and made many valuable corrections and suggestions. The study of the economic history of Maryland was undertaken during the writer's residence at Johns Hopkins University, and as a whole the work owes much to the suggestions and the inspiration of Professor John M. Vincent.

C. P. G.

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MONEY AND TRANSPORTATION IN MARYLAND, 1720–1765

INTRODUCTION

There are in every community many things—such as money, roads, and means of communication—which tend to bind persons together and to make possible that intercourse between man and man which constitutes trade. Chief among these integrating forces is the monetary system, without which no interchange of products is possible. From the cattle of the early Romans to the clearing-house certificate of the modern banker, every civilization shows its own peculiar form of circulating medium.

The American colonies, particularly those in the South, present some extremely interesting features in their monetary systems. No less than five kinds of money were circulating side by side in Maryland during the middle years of the eighteenth century. Coin—gold, silver, and copper—constituted, of course, the standard money, though in amount it was unequal to several of the other currencies. The chief use of metallic currency was in the payment of personal expenses and other small debts. Next in importance to coin were bills of exchange, which were employed for many transactions within the colony, were largely used between the several colonies, and formed almost the exclusive medium in the English trade. The third form of Maryland money was the paper currency. First put forth in 1733, for thirty years thereafter printed money played a prominent part in the economic life of the colony. Naturally the circulation of these notes was restricted almost entirely to the boundaries of Maryland. From some points of view the

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most interesting money was tobacco. Though gradually declining in importance, yet as late as 1750 tobacco was perhaps satisfying more debts than any other medium. Other agricultural products were employed as currency and were sufficiently different from tobacco to warrant a separate classification. Their use, however, was limited.

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CHAPTER I

Coinage

Like all other civilized communities, the American colonies made gold and silver coin both their standard of value and, as far as possible, their medium of exchange. The southern and central parts of America proved so rich in the precious metals that they were able to replenish the disappearing supply in Europe; but as far as was known to the settlers, the English colonies were entirely lacking in gold and silver mines. Hence one of the first economic problems facing the English colonists was to procure enough bullion to supply the needs of their growing trade.

From England, the source of the great bulk of supplies, bullion was to be had only in small quantities. The balance of trade was overwhelmingly against the colonies, and in the ordinary course of commerce no money importation whatever could be expected from England. Outside of trade there were three channels by which a certain amount of coin reached Maryland from the mother-country. The first and most important of these was through settlers. It is natural to suppose that most emigrants, on leaving England, would provide themselves with more or less pocket-money to meet immediate demands. The amount of such a supply is very difficult to estimate, but with four or five thousand settlers a year, it was probably an appreciable addition to the monetary resources of the colony.

The second way in which money reached Maryland from England was through the payment of the expenses of incoming ships. Several of the harbor entrance fees were payable only in sterling. Some of these fees went directly to the crown or to the proprietor, and the money perhaps never circulated in Maryland at all; others came to the local

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officials and were quickly spent in the colony. Besides the custom-house dues, ships were also liable for pilotage, provisioning, repairing, and other incidental expenses, which would often be discharged in coin brought from England for those purposes. Sailors, too, would spend a part of their wages during their stay in the colony, and captains frequently paid in sterling for the casks in which tobacco was shipped.[1] It is evident that each ship entering from England was compelled to add her mite to the coin in the colony.

The third method by which England contributed coin to Maryland is more interesting than important. In 1660 Lord Baltimore attacked the problem of Maryland currency, and undertook to supply a coinage of his own.[2] Because of the Fendall revolution the project came to nothing at that time, but it was renewed in 1661. In that year there was passed an act for the establishment of a mint in Maryland,[3] but it is a question whether such an institution was operated in the colony, or whether the proprietor sent over to Maryland coins that he had caused to be struck in England.[4] A few Maryland coins have been preserved.[5] The amount of currency thus provided will never be known, but it could not have been large. An act of twenty-five years later, 1686, again complained of the scarcity of coin, and attempted to remedy the evil, not by increasing the output of the mint, but by regulating the values of foreign coins.[6] Apparently the mint had already been discontinued. In any case the output did not remain an appreciable element in the coinage, and in the records subsequent to 1700 I have never seen an indisputable reference to a Maryland coin.[7]

[1] Lower House Journal, May 6, 1736. It was at one time proposed to tap these sources for sterling money to pay the quit-rents.

[2] Archives of Maryland, vol. iii, pp. 365, 383, 385.

[3] Act of May 1, 1661. See also T. Bacon, Laws of Maryland at Large, 1662, ch. 8.

[4] R. Ruding, Annals of the Coinage of Great Britain and its Dependencies, vol. i, p. 417; J. H. Hickcox, An Historical Account of American Coinage, p. 16.

[5] The Maryland Historical Society has several of these coins.

[6] Act of November 19, 1686.

[7] About the time of the famous Wood patent to supply a coinage for Ireland, there was a similar project on foot to supply the Ameri-

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It is evident that the amount of bullion entering Maryland from England must have been utterly inadequate to supply the needs of the colony. Some other source had to be found, which proved to be the West Indies. The trade between those islands and the English mainland colonies usually resulted in a balance against the islands. The West Indies were dependent upon the mainland colonies for their supplies of grain, lumber, and provisions, and the sugar and molasses which they exported were insufficient to balance their heavy staple imports. Much bullion, consequently, was shipped from the West Indies to North America;[8] in fact, the continental colonists came to look upon the West India fleet as gold-laden in much the same way that the Spaniards looked upon their Indian galleons.[9] In this trade Maryland did not take a prominent part. From the early days of the colony it seems that a few small ships sailed each year for the West Indies, and after about 1730 the trade began to grow more brisk, but even in the later years of the colonial period this traffic constituted but a small part of the total commerce of Maryland. The amount of bullion brought directly from the West Indies to Maryland, though increasing as time went on, could not have been very large.[10]

The third and greatest source of bullion for Maryland was the neighboring colonies. Pennsylvania was extensively engaged in the West India trade, and drew thence large supplies of gold and silver which gradually filtered down into Maryland and Virginia. Much Maryland grain, instead of being shipped directly to the West Indies, was sold to

can colonies. The coins were made of an alloy resembling brass, and were issued in three denominations. This plan is also said to have been rejected by the colonists (Acts of Privy Council, Colonial Series, vol. ii, § 1341; Ruding, vol. ii, p. 72). No reference to such a coinage appears in any Maryland record.

[8] An Essay on the Trade of the Northern Colonies of Great Britain in North America, p. 7 (Pennsylvania Historical Society).

[9] "The Jamaica fleet carrying a large quantity of fine sugar also much gold and silver left Jamaica fifty sail in company" (The American Weekly Mercury (Philadelphia), March 17, 1720).

[10] Callister MSS. (Maryland Diocesan Library), September 30, 1757, show an importation of £14. 17s. 1d. from Antigua. See also extract from Mair, Book-keeping Modernized, in William and Mary Quarterly, vol. xiv, p. 87.

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Philadelphia and from there exported. This traffic was the means of bringing a great deal of Pennsylvania money into the northern counties of the Eastern Shore.[11] Another means of drawing money from Pennsylvania was through bills of exchange. By tobacco shipments Maryland and Virginia created large credits in England. Pennsylvania, having no staple to ship to England and drawing her manufactures almost exclusively from England, created large debts there. In order to meet these debts, Pennsylvania merchants purchased for cash Maryland and Virginia bills of exchange on England.[12]

Most of the money of Maryland and Virginia was, by one means or another, brought in from the north. The author of The Importance of the British Plantations in America, writing about 1731, estimated that £10,000 per year came to England from Philadelphia in Maryland and Virginia bills of exchange. A later writer said that Virginia received annually £16,000 sterling in cash for bills sent to Philadelphia.[13] In 1744 Benjamin Tasker complained to Lord Baltimore that the great amount of Spanish gold and silver brought in from New York, Pennsylvania, and Virginia was reducing the value of bullion and raising the rates of exchange.[14] In fact, after about 1750, not only Pennsylvania gold and silver, but also Pennsylvania paper money formed a large part of the currency throughout most of Maryland. In order to facilitate this circulation, in 1753 the standard

[11] "The farmer [in the lower part of the Eastern Shore] is so remote from the mills and the Cash market that he is glad to get goods for his wheat, the merchant ships this off, and by that means lays in Cash to their mutual convenience. The Planter in these parts [Kent and Queen Anne's Counties] who has wheat can get money for it very conveniently" (Callister MSS., July 26, 1761).

[12] Archives, vol. vi, p. 177; [Hall], The Importance of the British Plantations in America, p. 97 (New York Public Library).

[13] William and Mary Quarterly, vol. xiv, p. 89.

[14] "The great plentie of Spanish Gold & Silver brought into New York, Pensilvania & Virginia, and the high Insurance has made a great demand for Bills of Exch[a]; so great that the Trading people from these Places offer Spanish Silver at 5/ the ounce, Your Lordship takes it at 5/3, these offer 45 P Cent Exch[a]. for Bills in Spanish Gold, you take Gold at about 41, so that the Gold & Silver that is in my hands & that I shal hereafter take, must be Remitted" (Calvert Papers, No. 2, p. 117).

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of Maryland currency was made to conform to some extent to that of Pennsylvania.[15]

From Virginia, on the other hand, very little bullion could be drawn, for, having little West India trade, that colony also was seeking bullion, not exporting it, and even succeeded in drawing some coin from Maryland.[16] However, in certain parts of Maryland which were closely bound to Virginia either by position or by trade, eddies in the course of commerce brought in Virginia money. On the lower part of the Eastern Shore, for instance, Virginia paper was frequently found, and it is safe to conclude that the same causes that led to the importation of paper led also to the importation of bullion.[17] Yet indications are not wanting that even in these eddies of trade, bullion was carried out of Maryland as well as brought in.[18] On the whole, the drift of bullion was from the northern trading centers southward, and in this intercourse Maryland received at one side and paid out at the other.

Unfortunately for Maryland, her southern neighbors were not the only ones to whom money had to be paid. Every new country has to be made ready for the habitation of man, and the process of preparation necessitates an enormous amount of labor and capital, both of which must be drawn from longer settled communities. The new land offers opportunities for development and improvement far too vast for its own resources, and there follows a large importation of implements and supplies of all kinds, resulting in heavy debts which must be met by the exportation of money.

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[15] See page 32.

[16] "Virginia has not money to lend, that Colony on the contrary is in extreme want of Cash & I am credibly informed that scarce a month passes but Virginians come to Maryland for Gold & Silver and leave their Bonds & Land Deeds in the Custody of His Ldps. Tenants" (Archives, vol. vi, p. 177).

[17] A Worcester County estate inventoried in 1763 contained 8s. sterling, 37s. 6d. Pennsylvania currency, 38s. 6d. Virginia currency, 32s. 5d. Maryland currency (Land Office, Inventories, No. 84, p. 83). Such notices are frequent.

[18] See, for instance, a note for £27. 17s. 8d. current money of Virginia, to be paid in Spanish whole gold, sued for in Somerset County (Court Records, Liber 1757–1760, p. 22).

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No matter how much money is brought into a new land, it will all be sent off at once to purchase the material for further expansion and improvement. The entire American continent, especially the region covered by the tobacco colonies, was in this position during the formative period.

In Maryland this condition was especially acute. The northern colonists relieved the situation to some extent by manufacturing a good many articles for themselves, but the Maryland planters carried on very little household industry and imported almost every article they used. Slaves, farming implements, household goods, clothing—all were brought in by the English merchant, while tobacco and money had to be returned to pay the bill. We find, therefore, constant shipments of gold to England and great scarcity of gold and silver in the colony.[19]

The shipment of money to England is mentioned by many writers, and Englishmen generally were inclined to congratulate the mother-country on the wealth derived from this source. The author of The Importance of the British Plantations, published in 1731, after speaking of the movement of gold southward, continued: "This money by Circulation comes into the Hands of Store Keepers and Shop Keepers, who at the Departure of the Ships send it over here to *England* to purchase Goods."[20] Another author, writing about 1764, said that all the money brought in from the Spanish, French, and Dutch islands was remitted to Great Britain.[21] These shipments of course fluctuated with the exchange, depending upon the amount of money in the

[19] Governor Sharpe complained that the heavy imports drained off the money supply (Archives, vol. vi, p. 164).

[20] "From this Province [Pennsylvania], by Way of *Maryland* and *Virginia*, we have at least £10,000 a Year: Most of it comes from *Philadelphia* thus; The Masters of Ships in those Provinces are above all others under the Necessity of having Money for their Expenses for which they give their Bills, and these Bills are frequently negotiated at *Philadelphia*, by which Means the Money is drawn thence. This Money by Circulation comes into the Hands of Store Keepers and Shop Keepers, who at the Departure of the Ships send it over here to *England* to purchase goods" (p. 97).

[21] An Essay on the Trade of the Northern Colonies of Great Britain in North America, p. 8.

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colonies and the value of the tobacco safely exported.[22] In times of war the shipments were usually not trusted to merchantmen, but were sent on board men-of-war.[23]

With a bullion supply naturally limited, with a slight outflow of money toward Virginia, and with an insatiable demand for English goods which must be paid for with coin, it is not surprising that Maryland suffered a severe dearth of money. As late as the beginning of the eighteenth century the use of coin was limited to "pocket-expenses," while tobacco served all larger trade purposes.[24] In 1754 Governor Sharpe found that there was enough gold and silver in the colony for the people to pay all taxes in that medium,[25] but it is presumable from that statement that there was not an abundant supply. At the time of the Stamp Act, Benedict Calvert wrote that he could not see where America was to get the money to pay the stamp duties.[26] Even in 1788 Brissot de Warville found the scarcity of small money inconvenient.[27] In the controversy over the method of paying the quit-rents the scarcity of money, especially sterling coin, and the difficulty in procuring it even in small sums are frequently recognized.[28] It is evident that this matter was one of the most prominent features in the economics of the colony.

At that time there were no banking facilities to substitute credit for coin, and every man had to hoard up sufficient

[22] See pages 42–46. W. Douglass, A Discourse Concerning the Currencies of the British Plantations in America, p. 24.

[23] Archives, vol. ix, p. 538; vol. xiv, p. 60.

[24] [J. Oldmixon], The British Empire in America, vol. i, p. 343.

[25] Archives, vol. vi, p. 85.

[26] Calvert Papers, No. 2, p. 261.

[27] New Travels in the United States of America, vol. i, p. 377.

[28] Lower House Journal, April 15, 19, 21, 1735. "The Discontinuance of that Method [of paying quit-rents] is attended with greater Difficulties and Inconveniences than could have been forseen; Which Difficulties Must Encrease in proportion to the Scarcity of Gold or Silver in the Country" (April 19). "But alass, they [quit-rents] Cannot be Collected, there is not money enough here to be got to make regular payments from time to time, so that your officers must take Corn, Wheat, Beef, Pork, Tobacco or some Commodity of the Country" (B. L. Calvert to Lord Baltimore, October 26, 1729, in Calvert Papers, No. 2, p. 72).

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treasure to meet all expected liabilities. As this naturally meant that much money was idle, a given volume of business required a greater supply of currency than would be the case today. To meet the demands of trade it was often necessary to offer special inducements to attract specie payments. Advertisements at times limited the kinds of money that would be accepted,[29] and reductions were made for payments in cash. Henry Callister, in business on the Eastern Shore, on one occasion advertised a quantity of saddlery, payment for which would be accepted one half in goods and one half in money, and added, "I mean sterling specie (not bills) as gold or silver money or any foreign coins."[30] It was customary with this merchant to deduct ten per cent for payments of cash.[31]

The people of the time believed that the scarcity of money was responsible for much more serious disorders. They considered it the direct cause of the sluggishness of Maryland trade. Expression of this vague feeling is given in Sotweed Redivivus:—

> "It's Industry, and not a nauseous Weed,
> Must cloath the Naked, and the Hungry feed.
> Correct those Errors length of Time have made,
> Since the first Scheme of Government was laid
> In Maryland, for propagating Trade,
> Will never flourish, till we learn to sound
> Great-Britains Channel, and in Cash abound."[32]

The same idea appears in other connections,[33] and seems to have been prevalent among both colonists and merchants. There is, however, little foundation of truth underlying this feeling. Undoubtedly trade suffered some inconveniences from the scarcity of money, but commercial activity depends upon conditions much deeper than mere money

[29] Plantations were sometimes advertised for sterling money only (Maryland Gazette, November 18, 1747).
[30] Callister MSS., January 22, 1766.
[31] Ibid., August 27, 1761, and various other dates.
[32] Maryland Historical Society, Fund Publication, No. 36, p. 36.
[33] Advice of London merchants, in Maryland Gazette, April 15, 1729; Preamble to act for encouragement of importation of gold and silver; Bacon, 1729, ch. 15; preamble to paper money act of 1731, in Laws of Maryland, 1731, p. 5.

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supply. Had the relative location of markets and productive forces been such as to invite the people of Maryland to engage in trade, a sufficient supply of money would have become very quickly available.

The greatest evil arising from the scarcity of bullion was the confusion produced by efforts to provide other monetary materials. From the very beginning the colonists found it necessary to carry on their transactions in some substitute for gold and silver. At first the money of the Indians was employed; but in Virginia and Maryland tobacco soon took the place of wampum; and by the middle of the eighteenth century, as has been said, there were no less than five separate monetary substances current in Maryland. Of course, even with a bountiful supply of gold and silver, bills of exchange would have continued to be drawn, but they would never have reached such wide currency had they not been needed as a substitute for bullion. Interminable difficulties arose from such a complex system.

The Maryland colonists tried to remedy the scarcity of gold and silver not only by providing other monetary expedients, but also by encouraging the importation of the precious metals. Sotweed suggested that tobacco buyers should be obliged to pay one sixth in currency or bills and the rest in goods.[84] In order to provide sterling money for the payment of quit-rents, the proposal was made in the legislature at one time that every incoming ship be required to exchange a certain amount of coin for its equivalent in paper money.[85] Neither of these suggestions was ever carried out, but a direct bounty on the importation of bullion was established. In 1729 it was enacted that every one liable for import or export duties who would pay in imported silver or gold should receive a rebate of fifteen per cent. An oath had to be taken, however, that the bullion had really been imported, and had not previously been exported for

[84] P. 44.
[85] Lower House Journal, May 6, 1736.

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the purpose.[36] It is impossible to find any evidence indicating the amount of coin brought in by this act.

In general, the quantity of bullion in Maryland seems to have increased greatly between 1720 and 1765.[37] It is impossible, of course, to make a trustworthy estimate as to how much currency there was in the province at any given time, but there are more references to money in the later than in the earlier years. In 1708 there was little money in the colony other than the Dutch lion dollars, commonly called dog dollars.[38] By 1731 the amount of money in the province had increased so much that the legislature attempted to fix a legal value for a number of coins not before mentioned.[39] Exchange fluctuations make it clear that some coin was driven out of the country by the emission of paper money in 1733;[40] but it will be recalled that in 1744 Tasker spoke of the high exchange as caused by "the great plenty of Spanish Gold and Silver."[41] The Callister letters show that in the northern part of the Eastern Shore after about 1745 an appreciable amount of business was transacted on a money basis. The Charles Hammond ledger also shows that about 1764 at least one store in Annapolis was trading almost exclusively for coin.[42] This was certainly not true of

[36] Bacon, 1729, ch. 15.

[37] This statement seems true in spite of bitter complaints by Henry Callister of the scarcity of money. On December 17, 1764, he wrote: "there is no record since this province was called Maryland, of such a scarcity of money, whether real or imaginary, as at this juncture" (Callister MSS.). It is only in a community where money is in general use that such a complaint could originate.

[38] Bacon, 1708, ch. 4.

[39] Lower House Journal, August 25, 31, 1731.

[40] "The paper currency has already (tho not in circulation) raised the value of Bills of Exchange which is not doubted will reach to 40% or more" (Calvert Papers, MS., No. 295½, p. 66).

[41] See page 14, note 14. On the other hand, Francis Jerdone, of Virginia, wrote in 1754 that "the Gold and Silver which was current in the country a few years ago is now chiefly vanish'd" ("Letter Book of Francis Jerdone," in William and Mary Quarterly, vol. xi, p. 241). This is hard to explain. It may have been a temporary or a local condition, or else Jerdone's observation may have been in error.

[42] Charles Hammond ledger (Maryland Historical Society).

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the business methods of earlier days.[43] Such an increase in the amount of gold and silver is exactly what one would expect to accompany the general economic changes taking place in the colony. Grain raising and the West India trade were increasing; consequently the means of procuring money were becoming more numerous. Moreover, as the country became more thickly settled and more completely developed, one would expect the economic dependence upon England to lessen. Though the latter movement cannot be detected, it must have been in progress. Hence, with its importation increased and its exportation diminished the supply of bullion on hand could not but have enlarged.

So varied were the sources from which Maryland drew her gold supply that coins of almost every nationality entered her ports; and because of the absence of a mint, all circulated in their native garb. A motley appearance, indeed, must have been presented by an ordinary colonial till.

First[44] among all the coins in circulation should be put the sterling money of England. The golden guineas, sovereigns, and half sovereigns, the silver crowns, half crowns, florins, shillings, and sixpences, and the copper pennies and half-pennies,—all these circulated in Maryland as in England. This kind of money, however, was scarce and in great demand. Certain dues, such as quit-rents and a few customs duties, were payable only in sterling, and although foreign gold and silver seems usually to have been accepted, all disputes as to exchange were avoided by having the British

[43] The numerous accounts which appear in court records during the earlier years of the century show payments almost exclusively in tobacco. So also do accounts from the more backward tobacco counties in the later years. Note the difference in force between the following quotations, the first written in 1714 and the second in 1765. "I have 6 head of cattle at John Morris which I desire the to sell to best Chapman that thou canst conveniently get for money if it be to be had or else for good tobacco" (Bozman Papers, Library of Congress). "There is hardly any currant money in Maryland. Cannot sell my land. Have advertised without receiving an offer" (Callister MSS., November 10, 1765). In the former the cash sale seems possible but exceptional; in the latter cash is generally used, and business is at a standstill without it.

[44] The coins from the proprietor's mint were so few as to be negligible.

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coin.[45] In amount sterling was but a minor part of the circulating medium, the greater part of the gold and silver currency consisting of foreign coins,—Spanish, French, Portuguese, German, Dutch, and Arabian. As the Spanish-American provinces formed the chief source of the money supply, the Spanish pieces greatly predominated.

The most numerous and most important Spanish coin was the large silver dollar or piece of eight. No less than six varieties of this coin circulated in the colonies. The old Seville dollar and the Mexican dollar were equal in value, being estimated at the time[46] to be worth about 4s. 6d. sterling. The pillar dollar, so called from the Pillars of Hercules[47] represented upon the reverse, was worth about 4s. 6¾d. sterling. The cross dollar, a coin bearing a cross on the obverse, was worth about 4s. 4¾d. sterling. The large number of dollars issued by the mints of Peru were worth no more than 4s. 5d. sterling each, and the new Seville dollar fell in value to about 3s. 7¼d. sterling. Thus the extreme range of values among the various Spanish dollars was 11½d.[48]

In addition to these Spanish pieces there were three other

[45] "As it might perhaps be difficult for the Exporter of Tobacco & Importers of Rum etc. to get at all times sterling Money Liberty should be given them to pay the Duties either in sterling Money or foreign Coin rated so as to be equivalent to sterling as for Instance a Spanish Dollar at four shillings & six pence & other specie in similar proportion" (Archives, vol. xiv, p. 91). In the quit-rent disputes the complaint was sometimes made that collectors demanded sterling coin, or accepted foreign coin only at exorbitant rates (Lower House Journal, May 12, 1737).

[46] Except when otherwise noted, all values given here are according to the assay by Sir Isaac Newton. Though more accurate figures can be had today, it is thought best to give the older values, as it was in these terms that all calculations were made during the period with which we are dealing. Modern assays vary slightly from these values.

[47] In derision of the motto *nec plus ultra*, which ancient mythology had attached to the Pillars of Hercules, Charles V adopted as his motto *plus ultra*. The Pillars of Hercules with the latter motto appear on many Spanish-American coins.

[48] Negotiator's Magazine, pp. 345–346; 6 Anne, c. 30. The best study of the values of Spanish coins and the laws governing their issue is by W. G. Sumner, "The Spanish Dollar and the Colonial Shilling," in American Historical Review, vol. iii, p. 607.

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coins circulating under the name dollar. The old rix dollars of several states of the Holy Roman Empire varied considerably in both weight and value, but they all passed in Maryland at 4s. 6d. sterling, as valued in the proclamation of Queen Anne. The second non-Spanish dollar was the spread-eagle dollar. It was not listed in the proclamation, but was current in Maryland during the early part of the eighteenth century.[49] Finally there was the lion dollar of Holland, commonly known in Maryland as the dog dollar. It was worth about 3s. 7d. sterling. The spread-eagle dollar and the dog dollar probably found their way to Maryland from New York and Delaware, both of which had inherited them from the period of Dutch supremacy. Whatever their source, in the early part of the eighteenth century dog dollars were almost the only coins in circulation.[50]

Fractional currency in general was always scarce in Maryland,[51] but a few quarters and eighths of dollars were to be found. The Spanish dollar is divided into 4 pesetas or 8 reals, and these pieces were occasionally found in Maryland. The peseta was commonly called a pistareen, and the real was usually known as a bit.[52] These coins were somewhat debased, but probably passed current when by tale as fractions of the dollar.

After the dollar the piece next in importance in the currency of Maryland was the Spanish pistole or doubloon.

[49] Upper House Journal, August 31, 1731.

[50] Bacon, 1708, ch. 4.

[51] "I sometime ago mentioned my Intention of striking a Parcel of small Notes, from SIX PENCE TO HALF A CROWN each, to serve as small Money in Exchange, for my own Convenience and that of my Neighbours, provided no better Scheme was concluded on by the Gentlemen in Business; and as the Want of such small Money is notorious, I have therefore ventured to Print a Number of such Notes, . . . any of which shall be paid off in Silver on Demand, and the whole Notes called in, in less than 3 Years from the Date . . . If either the Legislature, or any Society of Gentlemen, can or will contrive a sufficient Quantity of small Money that will more effectually answer the Purpose, I will instantly call in all mine" (Advertisement in Maryland Gazette, August 27, 1761).

[52] These coins are occasionally mentioned; for example, Somerset County, Court Records, Liber 1749–51, p. 19; Baltimore County, Inventories, Liber E No. 5, p. 407; Land Office, Inventories, No. 83, p. 284.

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This was a gold coin worth, according to Newton, about 16s. 9.3d. sterling. While the pistole was occasionally called a doubloon, the latter name was usually reserved for the two pistole pieces, which were called double doubloons. These large gold coins formed a convenient medium in which to import large sums, and consequently were among the most numerous and most useful coins of the colony.

Next, perhaps, in importance to the Spanish coins were those of Portugal. The johannas rivaled the pistole in numbers and usefulness, and was the most valuable coin in use in Maryland. It was a large gold coin of the value of 35s. 11.98d. sterling. There was a half johannas of about half the weight and value. The moidore, a gold coin valued at 26s. 10.4d. sterling, was also much used. The Portuguese silver crusado was also listed in the proclamation of Queen Anne; it was worth 2s. 10d. sterling. This coin may have circulated in Maryland; but it is omitted from the list of coins in the act of 1753,[53] and I have never seen one mentioned in colonial accounts.

There were three French coins in common use. The new louis d'or, popularly known as the French guinea, was valued at 20s. ½d. sterling. A coin generally known as a French pistole seems to have been the old French louis of the value of 16s. 9.3d. sterling. Both of these were gold coins. The one French silver coin in general use was the écu, commonly called the French crown or the silver louis. This coin was valued at 4s. 6d. sterling.

Next to the coins mentioned above, the caroline, a gold coin of several German states and of varying values, was, perhaps, in most frequent use. The Bavarian caroline was worth about 20s. 4d. sterling,[54] and those of other states did not vary much from this value. The ducatoon of Flanders, valued at 5s. 6d. sterling, and the three guilder piece of Holland, valued at 5s. 2¼d. sterling, are also mentioned in the proclamation of Queen Anne, though they

[53] Acts of 1753, p. 43.
[54] P. Kelly, The Universal Cambist and Commercial Instructor, vol. ii, p. 160.

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seldom appear among the records of the province. A so-called "Arabian chequin" is often included in lists of coins,[55] and other pieces undoubtedly circulated in smaller quantities. In fact, acts regulating the coinage seldom fail to include a blanket clause providing for all other foreign gold and silver coins not enumerated.

The variety of coins in circulation would alone have been a source of considerable complexity, but still greater confusion was caused by the condition into which these coins had fallen. The lack of a mint made it necessary for coins to circulate year after year without any repairs and in the original form in which they had entered the colony. This was in part responsible for the great variety of coins in circulation. At the present day a cargo of foreign coin would be taken at once to the mint and fitted out in the national garb before entering circulation. Moreover, a battered or clipped coin today would quickly be withdrawn and restruck. It was not so in the colonial period. All the wear and tear, the battering, clipping, and cutting accumulated from year to year until, finally, the coins looked almost like misshapen, unstamped lumps of gold or silver.

Much of the bad condition of the coinage was due to natural wear and tear, but not all of it. The obtaining of a fractional coinage was also a factor. The scarcity of small change has already been noticed; and under these conditions the people were compelled to create a fractional currency by cutting the larger coins into several parts.[56] It was a common thing for a man in need of a quarter of a dollar to take out a whole dollar and cut off a quarter of it. A great part of the defacement of the coinage, of course, was the result of fraud. From time immemorial a thriving business has been carried on in sweating and clipping. As the coinage fell deeper and deeper into disorder, the opportuni-

[55] Acts of 1753, p. 43; Lower House Journal, November 9, 1763.

[56] Brissot de Warville, vol. i, p. 377. A great part of the money in the province "is cut into small pieces for the convenience of change" (Calvert Papers, MS., No. 278). So necessary was this that the act against clipping was repealed in order to permit a fractional currency to be made in that way (Bacon, 1729, ch. 2).

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ties for this became greater. Brissot de Warville described one of the tricks common in his day: "A person cuts a dollar into three pieces, keeps the middle piece, and passes the other two for half dollars. The person who receives these without weighing, loses the difference, and the one who takes them by weight, makes a fraudulent profit by giving them again at their pretended value; and so the cheat goes around."[57] Another form of fraud was the ubiquitous deliberate forgery. With the coinage in such disorder, counterfeiting was the simplest of trades, and there is no means of telling how many lumps of lead were washed over with gold and passed at bullion value.[58] In 1754 there were complaints of an inundation of counterfeit copper pennies and halfpence. It is said that they became so numerous in New York that bills were paid with wheelbarrows.[59]

At first an effort was made to prevent all tampering with coins. In 1707 it was discovered that there was no law to prevent counterfeiting, clipping, or otherwise misusing foreign coins, and an act was passed providing that offenders be whipped, pilloried, and, finally, branded and banished.[60] The currency at this time was not in a state of confusion at all comparable to that of a later period; coins were still passing by tale, and money scales were almost unknown in the province.[61] Conditions were ripe, however, for an increase in the disorder, of which the passage of the law itself may be taken as an indication.

Soon after this the increasing supply of Spanish and other foreign money began to be felt; coin came into more general use; and in spite of the law the shears became more

[57] Vol. i, p. 377.

[58] The American Weekly Mercury says that a man broke Dorchester gaol, who was a "manifest utterer of Counterfeit Gold Bars" (August 26, 1725). "Great frauds have been discovered by passing bits of Brass etc. for gold, whereby very cautious people have been much imposed upon" (Calvert Papers, MS., No. 295½, p. 66).

[59] Maryland Gazette, February 28, 1754.

[60] Bacon, 1707, ch. 4.

[61] Ibid., 1708, ch. 4.

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active. Within the next twenty years so many pieces were debased that gold and silver ceased to pass by tale, and came to be transferred largely by weight. So pressing was the need of fractional coinage and so general the practice of cutting up larger pieces to produce it that in 1729 the legislature removed all restrictions on the cutting of foreign coins.[62] About this time money scales begin to make their appearance in the inventories, and from then until the end of the colonial period they are commonly mentioned. Many coins, of course, continued to pass by tale, especially as the new coins brought in were usually of the better sort. But it was not unusual for each coin to be weighed; and very frequently in payments there would be a number of broken coins, or even mere lumps of metal, all of which would go by weight.[63] Many entries make no reference to money, but merely speak of so many pennyweight or ounces of gold or silver worth so many shillings.[64]

Although cut gold and silver was unavoidable in colonial dealings, yet it seems always to have been shunned. There was frequently a careful distinction made between cut gold and whole gold. Notes and other contracts often specified that they should be paid in whole gold,[65] and cut gold was sometimes discriminated against by accepting it only at a reduced value.[66] In 1737 Lord Baltimore instructed his receivers to accept no cut gold or silver at all.[67]

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[62] Upper House Journal, July 15, 1729.

[63] Silver plate when inventoried was in no way distinguished from broken silver except in the name.

[64] Examples may be found in any volume of inventories for this period. Sotweed Redivivus makes a reference to clipping. He suggests (p. 40) that the legislature pass an act

> "That Copper Money, Tin, or Brass,
> Throughout America should pass:
> Which Coin shou'd the King's Image bear;
> In equal Worth be ev'ry where:
> Not subject to be clipt by Shears,
> Like Yellow-Boys, have lost their Ears;
> But as a Free-born Subject range,
> Of different Size, for ready Change."

[65] Somerset County, Court Records, November Court, 1735, Liber X A No. Y, p. 109.

[66] Lower House Journal, May 12, 1737.

[67] Calvert Papers, MS., No. 295½, p. 29.

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When the current money was mostly in unfamiliar coins and denominations, and all so clipped and cut that scales were needed to determine its value, it was to be expected that many difficulties would arise concerning the standards. There is evident throughout the colonial period a tendency to overvalue the coinage in general use and then to enact a series of standards of value legalizing the popular valuations. The following is the best theory I can suggest to explain this peculiar phenomenon.

The colonists were accustomed to the sterling denominations of pounds, shillings, and pence, and always employed them as standards of value. The money that they actually handled, however, was in dollars, crowns, pistoles, and so on. Nothing short of an assay could determine the exact value of the one in terms of the other. These conditions gave rise to a peculiar situation. A merchant setting his prices found it just as easy to vary the rate at which he would accept money as to vary the prices at which he would dispose of his goods. In order to attract the much needed specie, therefore, it was simpler to allow an excess valuation to the dollar than it was to allow a discount on his prices. For example, a dollar worth four shillings sixpence sterling might be received by a merchant under the pressure of competition at six shillings. In fact, it was customary in many places to determine the price of goods entirely by their cost in England, and competition took place only in the allowances to be made for tobacco and coin received in exchange. Thus there was a constant tendency to receive coin at rates above its intrinsic value. At first this would result in a decided reduction in the price of goods, since four and a half shillings worth of silver in a dollar purchased six shillings worth of goods. When, however, all the merchants of a community had met the competition, a customary value had been set for foreign coin, and dealers marked up their goods in accordance with the advance in the valuation of the dollar. When this was accomplished, a new standard of value had been created. The word shilling no longer meant

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the value of the same amount of silver as formerly, but it meant the value of a smaller amount. Of course the sterling meaning of shilling had not been entirely discarded, so the word in reality had two meanings—the old valuation and the new. Persons who were completing a transaction in shillings would have to understand which meaning of the word was intended. In fact, a merchant had two prices for every article, one price in the old shillings and a corresponding price in the new. In either case he contemplated receiving the same number of dollars. The assembly, acting under the impression that coin could be attracted into a colony by overvaluing it, was ever ready to accept and legalize a high rate that had been established by custom, thus hardening a popular custom into statute law. This process might be gone through a number of times, each time resulting in a new standard of value and a new statute legalizing that standard. If this be the proper explanation of the phenomenon, it will be observed that such a procedure is possible only in a community where the money is not in the same denominations as the standard of value used by the greater number of the people.

By some such process the currency had by the close of the eighteenth century been brought into great disorder.[68] Maryland seems to have been the first colony to complain of this situation;[69] and upon the advice of the Board of Trade, Queen Anne in 1704 issued a proclamation giving the sterling values of eleven of the more common silver coins,

[68] Douglass, A Discourse Concerning the Currencies of the British Plantations in America, p. 7. For a different theory see W. Z. Ripley, "The Financial History of Virginia, 1609–1776," in Columbia Studies, vol. iv, pp. 135–144.

[69] "And hence sprung such Confusions in Dealings, that one of the Provinces more injured than the rest, FIRST complain'd of the Evil; and that was *Maryland*. This Complaint was transmitted by Col. *Blakiston* Governor of that Province, at the Request of the Assembly, to the Board of Trade; Representing that the advancing the Rates of Coin in the Plantations, especially in *Pennsylvania*, was the occasion of draining the Money from *Maryland*. Whereupon the Lords of Trade took the matter up, and reported to the late Queen *Anne* the indirect Practices occasion'd thereby" (Publications of Prince Society, Colonial Currency Reprints, vol. iv, pp. 140, 141).

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and commanding that after January, 1705, no foreign silver should be circulated at any rate exceeding an overvaluation of 33⅓ per cent. Thus a Mexican dollar, which was worth intrinsically 4s. 6d. sterling, should not pass for more than 6 shillings; and foreign silver of the value of £100 sterling should not pass at above £133. 6s. 8d. In 1707 the provisions of this proclamation were enacted by Parliament into statute law.

The result of this regulation was not, as has sometimes been supposed, to cause foreign silver to circulate at rates above its value. No act of Parliament could do that. But the result was to create a new standard of value—a new pound as distinct from the ordinary pound sterling as was the penny from the sou. Prices adjusted themselves to the standard,[70] and whenever it became necessary to compute the value of English sterling coins in terms of the new pound, they were always increased in valuation at the ratio of 100 to 133⅓. From this time on the colonists had to be careful in which standard they were reckoning, whether in the pound sterling or in the pound currency. In general, all accounts between persons within the province and all provincial government accounts were kept in currency, while foreign accounts—especially accounts with English merchants—proprietary accounts, and accounts with the English government were kept in sterling.

The proclamation and the succeeding act touched only upon foreign silver coins.[71] Foreign gold coins continued to circulate without any legal regulation. Custom soon adjusted them to the new standard, however, at slightly above their intrinsic value. A pistole, the intrinsic value of which according to Newton's assay was 16s. 9.3d. sterling, or 22s. 4.4d. currency, passed at 23s. 10d. currency.[72] At the same

[70] Chancery Record, Liber J R No. 4, pp. 258–259.

[71] The coin in most frequent use was the Dutch lion or dog dollar. This was not included in the proclamation, and was accordingly supposed to pass by weight. The legislature in 1708, however, set its value at 4s. 6d. (Bacon, 1708, ch. 4).

[72] Land Office, Inventories, No. 4, p. 292; No. 6, p. 159; No. 83, p. 345; No. 86, p. 282; Court Records, Provincial Court, Liber R B No. 2, p. 314; Charles County, Court Records, November, 1735.

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time gold bullion, which was worth roughly 5s. 2d. currency per pennyweight, was passing at 5s. 6d. currency,[73] and silver, though fluctuating, tended strongly to settle at the rate of 6s. 8d. currency per ounce troy.[74] In 1731 and again in 1750 the legislature undertook to establish fixed rates for coins not mentioned in the proclamation, but neither bill became law.[75]

The currency continued in the condition in which it was placed by the proclamation until about 1733. In that year £90,000 currency in paper bills was issued under the condition that one third of it should be paid off and canceled in 1748, and the other two thirds in 1764.[76] This was the first paper money of Maryland. These bills were issued in the denominations of the pound currency, and not the pound sterling. Thus, when paper was at par, £133. 6s. 8d. in paper was equal to only £100 sterling.

The term currency, which had heretofore been employed to designate the standard created by the proclamation, was now applied by law to the new paper money. While paper was at par, the pound currency when paid in paper was the same as the pound currency when paid in gold or silver; both were equal to 13s. 4d. sterling. As paper depreciated, these values became widely different; and since all currency debts were by law payable in paper, the term currency clung

Liber T No. 2, p. 109; November, 1727, Liber Q, p. 48; Cecil County, Court Records, August, 1723, Liber S K No. 3, p. 24; March, 1724, Liber S K No. 3, p. 204; Somerset County, Court Records, August, 1732, Liber F L No. D, p. 241; November, 1749, Liber 1749–1751, p. 29.

[73] Land Office, Chancery Record, Liber J R No. 2, p. 538; Land Office, Inventories, No. 8, p. 281; No. 9, p. 227; No. 17, pp. 82, 213; No. 85, p. 138. Governor Ogle stated in 1740 that "gold passes at 5^{s} 10^{d} the ounce by custom only." Granting that he was confusing ounce and pennyweight, his statement is still several pence wide of other statements (Board of Trade, Proprieties, vol. xv (Public Record Office, C. O. 323: 13), T 35).

[74] Land Office, Inventories, No. 4, pp. 155, 248; No. 6, p. 223; No. 7, p. 226; No. 8, pp. 22, 75; No. 9, p. 35; No. 12, pp. 166, 410; No. 17, p. 151.

[75] Upper House Journal, July 17, August 30, 31, 1731; Lower House Journal, August 30, 31, 1731; May 30, 1750.

[76] Bacon, 1733, ch. 6; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 323: 12), T 23.

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to the paper money instead of to the gold and silver. A new term was necessary to designate the old currency standard, and the term proclamation money or merely the words gold and silver soon came into use for this purpose. From this time on there were three distinct standards of value in the colony, and a person concluding a contract for a certain number of pounds or shillings had to specify clearly whether it was the pound sterling, the pound gold and silver, or the pound currency in which he was dealing.

After the changes due to the issue of paper had adjusted themselves, a tendency toward greater harmony between the standards of Maryland and Pennsylvania became manifest. In the latter colony a rate had been established for gold and silver one fourth cheaper than the proclamation rate, or 166⅔ Pennsylvania currency to 100 sterling.[77] The intimate commercial relations between the two colonies were already tending to popularize this standard in Maryland[78] when the legislature saw an opportunity to make use of it as a weapon in a quarrel of long standing. Public officials in Maryland were remunerated almost exclusively by the fees arising from their offices. These fees had long been paid in tobacco, and the right to determine the amount of each was one of the most cherished prerogatives of the proprietor. This prerogative was being assailed by the legislature. Every act that tended to raise the value of tobacco was made an excuse for scaling down the fees in proportion to the expected rise in price. In 1747, for the benefit of those who did not raise tobacco, paper money was made payable for all fees and other public payments at the rate of ten shillings for every hundred pounds of tobacco. But in 1753 paper was scarce, and it was thought advisable to make these fees payable also in coin, for which purpose a table of coins was inserted with the rate at which each coin should pass for paper money. At this time paper money

[77] H. Phillips, Historical Sketches of the Paper Currency of the American Colonies, first series, vol. i, p. 26.

[78] Library of Congress, MSS., Firm Accounts, Maryland and Virginia, Ledger, 1753, p. 103, quoted on page 36.

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was passing at about 152 currency for 100 sterling;[79] and in order to reduce officers' fees in an unobtrusive manner the legislature adopted for their table the cheaper Pennsylvania standard of 166⅔ to 100 sterling, and determined the value of each coin in paper at that rate.

Although this valuation of the currency applied legally only to fees and other public dues, yet it was soon adopted by many business men and became widely used.[80] According to the new standard, which was generally called common or running money, the Spanish dollar was valued at 7s. 6d. In proclamation money this coin was worth 6 shillings and in sterling 4s. 6d. Other coins were very roughly put at proportionate values,[81] so that reductions from one standard to another were always made at the rate of £100 sterling to £133⅓ proclamation money to £166⅔ common currency.[82] From 1754 to the Revolution common currency was one of the most widely used standards of value.

With the addition of common currency Maryland had three distinct standards of value for the precious metals. It must be kept clearly in mind that the different standards made no change in the actual value of any given gold or

[79] Archives, vol. vi, p. 85.

[80] Lower House Journal, November 8, 1763.

[81] The coin list is as follows:—

	£.	s.	d.
English guineas	1	14	0
French guineas	1	13	6
Moidores	2	3	6
Johannases	5	15	0
Half johannases	2	17	6
French milled pistoles	1	6	6
Spanish pistoles not lighter than 4 dwt. 6 gr.	1	7	0
Arabian chequins		13	6
Other gold (except German) per dwt.		6	3
French silver crowns		7	6
Spanish milled pieces of eight		7	6
Other good coined Spanish silver per ounce		8	6

—Acts of 1753, p. 43.

Objections were raised to passing the bill because it appeared to conflict with the proclamation act of 6 Anne (Archives, vol. vi, pp. 46, 131).

[82] E. Vallette, Deputy Commissary's Guide within the Province of Maryland, p. 52; Land Office, Inventories, No. 85, 151; No. 86, p. 212.

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silver coin.[83] The thing that varied was the meaning of the words pounds, shillings, and pence. If the value of a Spanish dollar or an "Arabian chequin" was to be translated into terms of shillings, it would have to be determined whether the shilling sterling, the shilling proclamation, or the shilling common was meant before it could be settled how many shillings were equal to the dollar or "chequin." The same amount of goods could be bought whether the dollar were called 7s. 6d. common money, or 4s. 6d. sterling.

Confusion in these standards was inevitable, the whole system consisting of approximations rather than of accurate values. To reduce foreign coins accurately to sterling or currency values required the use of fractions which would have been impossible to handle in general circulation. The proclamation of Queen Anne provided five different values for dollars of various mintage. Only one of these values was without a fraction of a penny in currency, and only one other without a fraction of a farthing. Between the lowest and the highest there was a difference of 1s. 2⅓d. currency. In general trade, however, all dollars passed at the highest value assigned by the proclamation. The values assigned by custom to those coins not mentioned in the proclamation varied still more widely from their intrinsic worth, and much irregularity prevailed in the values at which those pieces passed.[84] Transactions were often accompanied by as much haggling over the value of the money as over the value of

[83] Secretary Calvert failed to realize this fact when he feared that the new valuation would result in an unjust profit for those who lent or paid in coin at the new rates. As long as transactions all remained in the same standard, evidently nobody could lose; and wherever calculations were shifted from one standard to another, the proper percentage was added to or taken from the sum in order to retain an equality in value (Archives, vol. vi, pp. 45, 85, 131, 170, 177).

[84] The goods of William Card, of Worcester County, were appraised "In pistoles at twenty seven shillings & six pence Each,"—evidently a mistake for twenty-seven shillings each (Land Office, Inventories, No. 86, p. 332). Another set of appraisers avoided all possibility of mistake by putting below their enumeration of coins, "N. B. the Dollars, Guineas & Double Loons above not valued" (Land Office, Inventories, No. 86, p. 196).

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the goods.[85] The supreme case of irregularity is in the act of 1753. Although the legislature apparently intended in that act to set the standard at the rate of 166⅔ to 100 sterling,[86] only the two silver pieces really bear that relation. The gold pieces range between 158 to 100 for the French pistole and 169¼ to 100 for the French guinea. When the legal values of coins varied so widely, it is not surprising that in private exchanges even the legal values were not always adhered to.

Another difficulty in the monetary system was in reductions from one standard to another. Theoretically it seems simple enough to exchange from sterling to currency by adding a third, or the reverse by subtracting a fourth, and from proclamation currency to common currency by adding a fourth. But in practice the uneducated planter had trouble with this process; and frequently exchanges are found carried out in round figures near the proper amount,[87] and sometimes entirely improper ratios are employed.[88]

Aside from such errors as might be attributed to a lack of mathematical ability, complete confusion resulted at times from complicating the standards. In 1739 it was reported to the legislature that "the Accounts of Col. Samuel Young, late Treasurer of the Western Shore are so complicated, Viz. the Sterling with the Current Duties, and the different Exchanges Currency for Sterling, that it will take a great deal of Time and Deliberation, more than can be conveniently spared in Assembly Time, to state the several Sums annually raised for the Uses aforsaid."[89] Occasionally disputes as to monetary standards found their way into the

[85] Lower House Journal, May 12, 1737; June 16, 1749.

[86] It is possible that the legislature, having no idea of establishing a new standard, paid little attention to proportions.

[87] Chancery Record, Liber JR No. 5, p. 761; Land Office, Inventories, No. 17, p. 466.

[88] Chancery Record, Liber JR No. 2, p. 521; Somerset County, Court Records, Liber 1751–1752, p. 184. It is possible that in the latter case sterling bills are meant and that the exchange ratio includes also the premium on foreign exchange.

[89] Lower House Journal, June 9, 1739.

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courts.[90] Henry Callister had several controversies over various questions of currency. On one occasion he wrote: "I said Currency; which does not imply Maryland money, of which there is hardly any current—I think I was yet more particular; for I spoke of money & Exchange as Curr^{t}. in Pennsylvania, which is our current money at present."[91] At another time a neighboring merchant seems to have become sadly confused over the relations of currency, sterling, and bills of exchange.[92] The following entry in the ledger of a Bladensburg merchant is eloquent of the difficulties he was experiencing: "By Money lost by receiving Sterling Cash @ 65 p^{r} Cent Curry (as appears from p^{ce} of 8 pass^{t}. @ 7/6 Curry and pistoles @ 27/) for Goods, which I was oblidged to pass to Customers in Sterling; Exchange @ 50 p^{r} Cent."[93]

Recapitulating, the one point that stands out most clearly concerning the gold and silver currency of colonial Maryland is its scarcity. Though metallic money increased in amount as the eighteenth century progressed, it was never adequate

[90] "These defendants also say that the Complainants have in their said bill claimed Maryland Current Money yet they believe the Complainant Joseph Watkins himself was well conscious that the said Balance of the Account passed in the Commissary's Office was only common Money for that the Complainant Joseph Watkins hath received of the said Robert Swan in Parts of the said Legacy Pennsylvania Money at fifteen Per Cent difference and also Securitys Payable in Sterling at one hundred and fifty and one hundred and fifty-five Per Cent Exchange" (Chancery Record, Liber DD No. 2, p. 237). See also Chancery Record, Liber DD No. 1, p. 352; Liber JR No. 3, p. 110.

[91] Callister MSS., about 1761/2. Both date and address are missing.

[92] Ibid., August 24, September 6, 14, 1762. Callister finally delivered the following summary: "I know four ways in practice of reducing sterling to Currency, or rather of paying a Sterling account of cost. the first is in British Specie; the second in bills of exchange; the third in a Currency according to rate of Exchange equivalent to such bills; fourth in foreign silver & gold as also in Guinneas according to a value set by act of Assembly, and then render'd Sterling by the rule of Exchange as if they were paper" (ibid., 1765). Again he wrote: "I presume you don't think 7/6 equivalent to 5/ Stg. while the exchange is @ 70 in the specie as now current, unless you pay Maryland paper. If you pay sterling Money its' well, on Dollars at 4/6" (ibid., December 14, 1760).

[93] Library of Congress, MSS., Firm Accounts, Maryland and Virginia, Ledger, 1753, p. 103.

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to the needs of trade. What metal currency there was consisted mainly of foreign coins, a great many of which were so clipped and cut that they circulated mostly by weight. The uncertainty as to the value of these foreign coins led to the proclamation of Queen Anne and to the establishment of a new standard of value one third lower than the pound sterling. At the suggestion of Pennsylvania and by an almost accidental provision by the legislature in 1753, a third standard of value two thirds cheaper than the pound sterling became popularized. Because of the difficulties in dealing with so many coinages, wide inaccuracies in the valuation of money and serious confusion in the keeping of accounts are found. During the period under discussion the only advance made toward the solution of the coinage troubles was the gradual increase in the amount of circulating coin. In all other ways the confusion was constantly growing greater.

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CHAPTER II

Bills of Exchange

A bill of exchange in colonial times was the familiar instrument known in the middle ages as well as the present as an order on some person to pay money to a third party. Its use was extensive, and owing to the uncertainties of travel it was never executed singly, but always in sets of three or four. Each copy carried full liability provided neither of the other copies had first been honored, but the payment of any one copy canceled the others. Each of the copies would be transmitted abroad by a different route, and thus the chances of the loss of all were very slight.

Protests were frequent. The common procedure in such cases was for the payee to return the protested bill to Maryland for collection from the drawer. Payment was forced by a suit in the county courts. If the bill was returned within four years, it was granted an equal position with specialties having a legal preference over other kinds of debts. In colonial times commercial law held that in any case of broken contract the party at fault was liable not only for the sums mentioned in the contract, but also for damages to the offended party for the inconvenience sustained. Thus a note would usually be drawn for the payment of a certain sum on a certain day under penalty of the forfeiture of an additional specified sum in case the note was not met when due. The bill of exchange almost invariably carried a similar provision. In the code of 1715 an act was included limiting the damages that might be so collected to twenty per cent of the face of the bill and costs.[1]

Except for the slight initial difficulty in drawing up a set of bills to meet these conditions, the bill of exchange was

[1] Bacon, 1715, ch. 7.

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not a difficult instrument to use. It was safely portable; and though not divisible, it could easily be endorsed to a third party. Moreover, the needs of the foreign trade were such that bills on England were always in great demand. Another advantage enjoyed by the bill of exchange over most other forms of money was that it was drawn in the familiar sterling standard, and no calculations were necessary to make its value evident to the dullest planter.

These instruments were very numerous, primarily because of the fact that foreign commerce constituted an enormous proportion of the total trade of the colony and bills of exchange were the regular money in foreign transactions. A large part of the agricultural product of Maryland was shipped to England or the West Indies, and most of the manufactured goods used in the province were imported from England. A shipment either way created a credit that might be settled by a bill of exchange. The lack of banking facilities excluded the possibility of gathering these credits into blocks and having a special class of financiers make transfers in large sums. Each planter drew his own bill and negotiated it as best he could.

It is evident that the greatest use of bills of exchange was in transactions between Maryland and England. In these the course of bills was always from Maryland to England. Although imports from the mother-country created conditions in which bills might properly be drawn on Maryland, yet the trade custom was to settle accounts by the Marylanders' drawing on England. By this means it came about that the English merchant performed many of the functions of a banker. When the planter shipped his crop to a London merchant, it was almost equivalent to making a deposit in bank.[2] His purchases during the year might be made from the same merchant who received the tobacco,

[2] A still more direct form of deposit is seen in the order of the legislature that Mrs. Ungle lodge in the hands of Mr. Hunt, merchant in London, £381. 18s. 10d. sterling, in order to prevent suit being entered against her husband's bond (Lower House Journal, June 13, 1730).

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from some other English merchant, from some merchant in Philadelphia, or from a local store. In any case except the first, a bill of exchange on the tobacco consignee would perform the function of a check. Moreover, any balance from the tobacco crop left undrawn by the planter would not be transmitted to Maryland, but would be held on deposit by the merchant.

At times large credits were accumulated in this way, and when this occurred the merchant might perform still another function of the banker. At the planter's direction he would invest the money in bank-stock or other securities, and either transmit them to Maryland or hold them at the order of his client.[3] If there was a deficit instead of a balance from the tobacco shipment, the merchant acted again like a modern banker. If the shipper was unknown to the merchant or if his credit was not good, the excess bill would simply be returned protested like a check without funds. If the shipper was a man of established credit and known to the merchant, the bill would be honored and the balance charged to the planter's account exactly as an overdraft is sometimes treated by a bank. This overdrawing was often done with full knowledge by both planter and merchant, and constituted a loan.[4]

Besides the English trade, bills of exchange found a field of usefulness in commerce between the colonies. The West India trade, however, was carried on almost exclusively by

[3] Letter from "Maryland Planter," in Maryland Gazette, May 12, 1747. An example of this on a large scale is seen in the management of the paper-money issue. The provincial government used London merchants as bankers of deposit. Bills of exchange that were paid toward public dues were sent to William Hunt, a London merchant, for collection and deposit. When money was needed, bills were drawn against the funds accumulated in Hunt's hands (Upper House Journal, October 30, 1727; Lower House Journal, April 22, 1735).

[4] "We admire thou should draw such a large bill these times and know thyself in debt" (Daniel Maude to Ruth Richardson, in Bozman Papers, November 30, 1723). See also letter to John Hanbury, in Bozman Papers, September 1, 1727; Ridgely Papers (now in the possession of Mrs. John Ridgely of Hampton), September 28, 1764; ibid., Russell to Ridgely, 1766; ibid., March 23, 1767; Callister MSS., May 9, 1763.

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merchants who exchanged between themselves the various articles of commerce and were therefore able to settle many debts by merely balancing accounts. Under these circumstances bills of exchange, though occasionally useful, did not play such an important part as they did in London trade. Bills passed in both directions between Maryland and the West Indies, and in many cases exchange drawn on London was used to settle these provincial debts.[5]

Between Maryland and the continental colonies the situation was somewhat different. With the southern colonies there was little trade and consequently little occasion for money of any kind, but with New York, Boston, and especially Philadelphia, commerce was rapidly growing, and in transactions with these colonies bills were frequently used. The northern merchants imported heavily from Great Britain, but had few crops to export thither. Instead of making all payments by shipments of cash, they found it much more convenient to save freight and insurance by procuring from the South bills of exchange on London and sending these to their British creditors.[6] For this purpose, in some cases, cargoes were shipped from Philadelphia and sold in Maryland for bills of exchange. In other cases the bills were procured more directly but less profitably by having an agent in Maryland or Virginia buy them up for cash. This drift northward of bills of exchange is the most marked characteristic of their use in intercolonial trade.[7]

[5] Letter to John Stevenson, February 16, 1762, in Clark Letter-book (Pennsylvania Historical Society); Samuel Salmon to George Robins, June 10, 1738, in Bozman Papers.

[6] Board of Trade, Proprieties, vol. xi (Public Record Office, 323; 9), R-42; [Hall], The Importance of the British Plantations in America, p. 97; Clark Letter-book, pp. 26, 55; Fishborn to Richardson, 18th, 5 mo, 1717, in Bozman Papers.

[7] "To Bills of Exchange for the above five Bills sent by you to Philadelphia to sell £600 [sterling] which sold there for £960.. 6.. 7½ Curry. Clear of Expenses" (Library of Congress, Firm Accounts, Maryland and Virginia, Journal, 1766, September 25). "Curry" here means that £166⅔ currency equals £100 sterling; therefore, unless the expenses were very heavy, exchange must have been much below par. Notice a peculiar reversal of ordinary conditions shown in the letter of a merchant from Baltimore: "There are bills now in Town from Philadelphia selling for 60 PCt." (Taylor to Jamieson, in Jamieson Papers, vol. vi, no. 1252, Library of Congress).

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Within the colony the use of bills of exchange was much more extensive than is the case in a modern business community. The great number of bills drawn would in itself have given them an important place in colonial currency, but their convenience rendered them still more useful and important. Bills, consequently, passed freely from hand to hand, and satisfied many purely local debts before being transmitted to London for collection.[8] It was a common thing for a person collecting debts to request that they be paid in bills of exchange.[9] To this extent these instruments became a part of the circulating medium of the colony.

Being useful within the colony, salable to northern merchants, and almost indispensable for payments to England, bills of exchange were usually in great demand in Maryland. It has already been said that persons at times tried to collect from their debtors in bills. The Maryland Gazette frequently published advertisements of those who wished to exchange money for bills.[10] At the court sessions those in search of bills would meet and deal with the planters who were in a position to draw.[11] Some merchants seem to have acted as bill brokers, as they advertised that they would both buy and sell bills.[12]

Such an active demand naturally led to a premium on the price, and exchange generally stood above par.[13] Fluctua-

[8] Henry Callister mentioned payment by bills as one of the four regular ways in practice of settling sterling debts (Callister MSS., 1765). The receivers of quit-rents also contemplated payments in bills (Lower House Journal, May 12, 1737).

[9] A farm is advertised in the Maryland Gazette for sterling money only. This cannot but mean bills, as it would have been almost impossible to get together a large sum of sterling coin (November 18, 1747). Callister at times requested payments in bills, and at other times insisted on payments in cash and not in bills (Callister MSS., June 12, 1759; January 5, 22, 1766).

[10] May 24, 1745; May 18, 1748; May 30, 1754; May 28, June 18, 1761.

[11] An example from Virginia will in all probability hold for Maryland; see William and Mary Quarterly, vol. xi, p. 155.

[12] Maryland Gazette, October 4, 1759; January 1, 1761.

[13] The loose way in which the words sterling and exchange were often used in Maryland makes the consideration of the subject of the premium on bills of exchange peculiarly difficult. Sterling had no less than three meanings. It usually denoted

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tions occurred whenever anything affected the tobacco shipments. In years of poor harvest few credits would be created in London and bills would be scarce and high, but during years of good crops exchange would at times fall below par. In war times, in particular, the heavy damage inflicted by privateers caused the number of bills to be diminished and also caused the insurance rates on coin shipments to rise. At such times exchange rates rose to great heights. Jones, writing of Virginia about 1720, said that "for the Generality 10 per cent Discount is allowed for Sterling Bills."[14] The wording of the statement, however, shows that he had in mind storekeepers' abatement on accounts, which was probably higher than the regular premium on bills of exchange. Benedict Calvert said in 1720 that the Philadelphians were frequently obliged to give as much as eight or ten per cent premium for bills.[15] This remark leaves one with the impression that he also was stating the maximum. About this time the provincial government seems to have been selling bills at a loss of four or five per

merely the English standard of value. Besides this, it was also used to mean English coin; and, finally, it was clearly used at times to mean bills of exchange. Thus, the expression £10 sterling does not make clear whether the sum mentioned is ten English sovereigns, an amount of foreign money equivalent in value to ten English sovereigns, or a bill of exchange for ten sovereigns in England; the latter, of course, would be worth more or less than ten sovereigns according to the premium on foreign exchange. In the use of the word exchange one is not always certain whether to understand foreign exchange or the exchange between some of the different moneys in Maryland. At times the context makes perfectly clear which meaning to apply to these words, but at other times it is impossible to know what idea is intended.

[14] H. Jones, The Present State of Virginia, p. 45.

[15] Calvert Papers, No. 2, p. 73.

[16] Mair, in his Book-keeping Modernized, makes some statements that do not seem to be verified by other sources. "Bills on Britain," he says, "before the year 1744, generally sold below par, often at 15 per cent. But trade of late having turned precarious, by the wars with France and Spain, and the colonies having few effects in Britain to draw for, bills of exchange rose far above par; so that in the years 1745 and 1746, exchange run from 35 to 40 per cent" (William and Mary Quarterly, vol. xiv, p. 93). It seems impossible for exchange to have been normally below par previous to 1744. Shipments of money were always from the colonies to England; and as long as that condition existed, bills could not long remain below par.

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cent.[16] In 1723 Benjamin Tasker bought bills from the treasurer at £128 currency for £100 sterling exchange.[17]

In 1725 the same rate was again set.[18] In 1727, in order to save the loss, the legislature agreed to sell no more bills in Maryland but to negotiate them directly through a merchant in London.[19] The government, however, refused to assume any liability in case a bill should be protested, and this may have been the reason for the low prices. In 1728 the treasurers were authorized to dispose of bills at £135 currency for £100 sterling exchange.[20] This seems to have been very nearly the average premium at that time.

The issue of paper money caused a sharp rise in the price of bills of exchange. The proprietor complained in 1735 that even before paper had actually reached circulation the upward tendency was so strong that he did not doubt it would reach a rate of £140 currency for £100 sterling exchange—an advance of five per cent.[21] He was not mistaken, for the war period that followed between 1739 and 1748 caused an additional rise in the price. In 1744 the proprietor was offering 141 for bills but getting none, as bills were selling as high as 145.[22] In March, 1745, the agent informed the proprietor that "Bills of Exchange grow so valuable that they are hardly to be purchased."[23] Exchange quotations from the Callister correspondence during the years 1746 and 1747 show a tendency for bills to settle at £140 proclamation currency for £100 sterling exchange, but at times they ranged as high as £150.[24] In 1747 a government order for gold currency to be exchanged for bills and transmitted to England was returned unused because of the impossibility of negotiating it advantageously.[25]

[17] Lower House Journal, October 19, 1723. The par value of currency was £133⅓ for £100 sterling.
[18] Lower House Journal, October 16, 1725.
[19] Upper House Journal, October 30, 1727.
[20] Lower House Journal, October 25, 1728.
[21] Calvert Papers, MS., No. 295½, p. 66.
[22] Calvert Papers, No. 2, p. 118.
[23] Ibid.
[24] May 4, August 21, 1746; February 23, December 28, 1747.
[25] Lower House Journal, June 20, 1747.

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After the close of the war in 1748 it was to be expected that the price of bills would fall, but the decline was not immediately evident. The exhausted condition of the country and the accumulation of the debt to England maintained the demand, and in 1749 there was a greater amount of money offered for bills than during many years previous.[26] In 1754, however, Governor Sharpe quoted exchange below par, or at from £162½ to £165 gold and silver valued according to the inspection law (£166⅔ inspection law standard equalled £100 sterling) for £100 sterling exchange.[27] But five months later the same man made a general statement that exchange with England was "rather above par."[28] There seems to have been a period of low exchange corresponding only very roughly to the period of peace and extending well into the time of the French and Indian War. In 1758 exchange was so low that bills found no sale in Philadelphia,[29] and even as late as 1759 Henry Callister apparently refers to a low state of that market.[30] A contract between William Buchanan, Thomas Ringgold, and others, made in July, 1760, seems to have assumed that exchange was about seven per cent below par.[31] In August, 1760, however, war conditions began to have their full effect. So destructive were the privateers that little tobacco reached home, and bills of exchange grew very scarce and very dear.[32] From this time to the end of the period under con-

[26] "Letter Book of Francis Jerdone," p. 155. This statement is made of Williamsburg, Virginia, but any such economic condition would be general throughout both Virginia and Maryland.

[27] Archives, vol. vi, p. 85.

[28] Ibid., p. 164.

[29] Ibid., vol. ix, p. 280.

[30] Callister MSS., June 12, 1759; November 30, 1760; April 30, 1761. The uncertainty as to terms in these letters is so great that it is impossible to be sure of the above statement. One point that is certain is that exchange in 1759 was low in comparison with 1761. The burden of Callister's complaint is that the rapid rise is working him hardship. See page 42, note 13.

[31] Chancery Record, Liber DD No. 1, pp. 253–280. The rapid rise of exchange that came shortly after this seems to have been responsible for the case getting into court.

[32] Callister MSS., August 11, 1760; April 30, 1761; Archives, vol. xi, p. 534; Chancery Record, Liber DD No. 1, p. 269.

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sideration exchange seems to have remained high,[33] but all quotations are so confused with Maryland and Pennsylvania currency that it is impossible to form an exact idea of the real foreign premium. Judging from the events following the peace of 1748, one would expect the exchange to remain high for several years after 1763 and then to fall to within a few points of par. The Callister correspondence seems to bear out this hypothesis. Quotations in Pennsylvania paper soared as high as £182½ Pennsylvania currency to £100 sterling exchange in 1762, but were down again to £170 in 1766.[34] In Baltimore Town, also, in the autumn of 1765 bills were selling as low as £160 and £162½ running money for £100 sterling.[35]

In spite of the high premiums, the principle of exchange seems to have been but little understood by many of the colonists. Inventories almost invariably carry out debts due from English merchants at the regular sterling value, though the actual value of such debts was from two to ten per cent higher.[36] Some calculations show wide and unaccountable variations in the value of bills.[37] Henry Callister had to carry on a prolonged argument with a neighboring merchant in order to convince him of the necessity of advancing the price of goods when exchange rose violently.[38]

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[33] On July 23, 1764, John Dorsey wrote: "I have sent Benny Dorsey down to get £100 Currency and Beg you'll speak to Mr. John Smith and get it at as good an Exchange as you Possibly can for Bills by the Going of your Ship. As the Necessity for it is so great I must give 65 PCt if it can't be had on Better Terms" (Ridgely Papers). By 65 PCt Dorsey meant about par or a point below. Par was 166⅔ for 100, but the people frequently used the round number 165. This was a case of necessity, and does not mean that exchange was normally at par.

[34] August 24, 1762; 1766. Notice that the depreciation of Pennsylvania currency and the premium on bills are here so combined that it is impossible to separate them. It is probable, however, that Pennsylvania currency at this time was worth about 166⅔, which would make an exchange premium of 182½ to 166⅔, or 9½ per cent.

[35] See page 41, note 7.

[36] Land Office, Inventories, No. 6, p. 246; No. 7, pp. 200, 258; No. 8, p. 217; No. 9, p. 40; No. 12, p. 493; No. 17, pp. 477, 522; and so on. Baltimore County, Administration Accounts, Liber C No. 3, pp. 122, 144.

[37] Land Office, Chancery Record, Liber JR No. 2, p. 538.

[38] Callister MSS., August 24, September 6, 14, 1762.

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Thus, in general, bills of exchange tended under normal conditions to pass at a premium of about 2 per cent, but fluctuated with variations in the crops, at times commanding as high as 6 or 8 per cent premium. With the issue of paper money the premium jumped to about 5 per cent, and continued high—sometimes as high as 10 or 12 per cent—during the war period of 1739 to 1748, coming back to normal about 1753. Then there set in a period of low exchange until about 1758 or 1759, after which the premium again rose to war heights. At the end of the period under consideration, 1765, it was again tending downward toward the normal.

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CHAPTER III

Tobacco Currency

When the English settlers found themselves without sufficient coin to transact the necessary business of the colonies, they were compelled to resort to the use of other materials than gold and silver as circulating media. Furs and wampum, the money of the Indians, were employed to some extent, and powder and shot became so popular as money that in some places they received semilegal sanction.[1] Indigo, rice, and sugar were also used in the southern colonies. In Virginia tobacco soon outstripped all other substances in popularity as money. Immediately on landing the Maryland settlers borrowed all the Virginia practices with regard to tobacco, and thus, from the very beginning, that staple became the chief money of the colony. As a circulating medium tobacco entered almost all the fields of usefulness that coin ordinarily reaches. Though never so declared, it was in fact the official money of the province. All levies—parish, county, and provincial—all fines and court charges, and all ecclesiastical and official fees were regularly assessed in tobacco.

The only dues of the provincial government not payable in tobacco were the customs duties, and with slight variations this condition lasted throughout the colonial period. By the paper money act in 1733 all of those dues that had previously been payable only in tobacco, except officers' fees, the ministers' salaries, and special assessments for the building of churches, became payable also in paper money or in gold and silver at the rate of ten shillings per hundred pounds of tobacco.[2] The act, however, left tobacco the

[1] Tonnage duties in Maryland were laid in powder and shot by act of 1661. See W. R. Shepherd, "History of Proprietary Government in Pennsylvania," in Columbia Studies, vol. vi, p. 401.

[2] Acts of 1733; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 323: 12), T. 23; Bacon, 1733, ch. 6.

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official money in which all public dues were rated, and allowed an alternative only in payment. By a supplementary act of 1735 all provincial and county taxes and bounties were for three years to be assessed and allowed in currency instead of tobacco,[3] and in accordance with this law certainly some, probably all, of the counties went on a money basis during the years 1736, 1737, and 1738.[4] After 1738, however, they all returned to a tobacco basis. During the eighteenth century the private revenue and those duties that were payable to the British government[5] were, of course, accepted only in coin or bills of exchange. It was only by a special arrangement that down to 1715 quit-rents and alienation fines were accepted in tobacco.

In the business world tobacco money was as prevalent as in the official world. Alsop, writing about 1660, tells us that "Tobacco is the current Coyn of *Mary-land* and will sooner purchase Commodities from the Merchant, then money."[6] Oldmixon some fifty years later voiced the same idea: "Tobacco is their [Marylanders'] Meat, Drink, Cloathing and Money; not but that they have both *Spanish* and *English* money pretty plenty, which serves only for Pocket-Expenses, and not for Trade, Tobacco being the Standard of that, as well with the Planters and others, as with the Merchants."[7]

Accounts submitted with cases brought into court also show the prevalence of tobacco money in mercantile affairs. Of these the regular type is a long list of imported articles purchased by the planter balanced against the hogsheads of tobacco that he had produced. In the tobacco counties scarcely one account in ten will show a payment from the planter to the merchant in any other medium, except possibly

[3] Acts of 1735, p. 2.
[4] Kent Levy Book, Chestertown; Queen Anne's County, Court Records, annual levy.
[5] Greenwich Hospital six-penny assessment and the penny per pound for William and Mary College.
[6] "A character of the Province of Maryland," in Maryland Historical Society, Fund Publication, No. 15, p. 68.
[7] Vol. i, p. 343.

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a hog, a day's work, or some article apparently intended for the merchant's own use. Goods were listed and charged for at tobacco rates, and should coin be offered in payment, bargaining would probably have been necessary to settle how many pounds of tobacco should be credited for a shilling sterling.[8] Notes, bonds, and other commercial instruments were largely drawn in terms of tobacco.

These larger commercial transactions offered the chief field of usefulness for tobacco currency. To be sure, some payments in small parcels did occur, notably the various official fees, which fell due in lots of sometimes only a pound or two, scattered all over the province. In the main, coin served for small transactions, and tobacco was used only to satisfy large bills.[9] Most dealing was done on open accounts, which soon accumulated into large sums and were paid in bulk by the transfer of tobacco. The popular notion that the Maryland and Virginia colonists traveled around with bundles of tobacco as pocket-money is without foundation in fact.

What little tobacco was paid out in small amounts may be said to have entered circulation as money, but in general tobacco did not circulate. Its monetary qualities did not interfere with its movement in the ordinary course of trade. The planter dealt with local merchants throughout the winter; when his crop was packed in the spring, he turned over to each merchant a portion as payment on the open account.[10] The tobacco itself generally remained in the planter's barn until the vessel came to receive the merchant's shipment. If a merchant transferred his tobacco to a third party, the transfer was effected by labeling the hogshead with the name of the new owner and letting it remain in the planter's barn until the third party's shipment was ready. Thus the actual movement of tobacco was directly from the grower to the shipper, and the commodity served as money only as it satisfied one or more debts in the course of its

[8] Callister MSS., about 1745.
[9] Quotation from Oldmixon on page 49; see also page 17.
[10] Callister MSS., about 1745.

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movement. There were economically only two important classes of people in the colony: those who produced tobacco and exchanged it for manufactured articles, and those who imported manufactures and exchanged them for tobacco. Barter between these classes was so direct that debits offset credits and no medium was needed other than the articles of commerce themselves. It was this simple relationship that made possible the extensive use of tobacco as money.

For this purpose tobacco showed in many ways a peculiar lack of fitness. The chief qualities of a good monetary substance as enumerated by economists are a proper supply, durability, portability, homogeneity, divisibility, and stability of value. We may consider the qualifications and disqualifications of tobacco as money by noticing how far it met or failed to meet these requirements.

The supply of tobacco was in amount equal to the monetary needs of the colony. About 1750 there were produced, on the average, 30,000 hogsheads of tobacco each year. This, at a valuation of £5 per hogshead, made a monetary supply of £1 per head for the 150,000 population,—free, bond, and slave. In the limited state of colonial trade this alone would have been an adequate supply of ordinary money, and considering the coin, bills, and paper then in circulation, it might seem that Maryland was oversupplied with currency. Tobacco, however, did not circulate, and each pound satisfied not more than one or two debts. Thus, while the amount was adequate, the peculiarities of tobacco currency cut down its efficiency to something less than the actual needs of trade.

Uncertainties in the supply of tobacco formed one of the chief objections to its use as a monetary medium. There were three serious variations in supply, namely, between the crops of different individuals, between different seasons of the year, and between different years. Variations in the tobacco supply of different individuals was not a question of rich and poor. Early in the eighteenth century tobacco raising had become so unprofitable that many persons aban-

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doned it for other occupations. In some parts of the colony grain began to assume the rank of a staple crop, and by 1760 several counties were producing grain almost exclusively. The inhabitants of these counties, with a few other small classes such as frontiersmen, artisans, and sailors, did not produce tobacco; and though as wealthy as the tobacco producers, these people often found themselves in serious difficulties when called upon to pay the regular tobacco levies. Complaints soon reached the legislature. In 1719, and again in 1720, petitions were received asking permission to pay the levies in money instead of tobacco, but the favor was not granted at this time.[11] Three years later the inhabitants of the city of Annapolis, who of course grew no tobacco, were refused a similar request.[12] In 1725 both Somerset and Cecil Counties complained of the tobacco levies.[13] The accumulation of these complaints was the chief reason for the issue of paper money in 1733. The bills then emitted were made payable for all colonial duties except official fees, the clergy's salaries, special assessments for building churches, the export tobacco duty, and the tonnage duties. In the payment of public charges paper was made equivalent to tobacco at the rate of ten shillings per hundred pounds.[14]

So numerous and important were the exceptions in the paper-money act that complaints about the necessity of producing tobacco continued as loud as before, and there are evidences that during the next few years the Lower House was making great efforts to procure the commutation of fees from tobacco into money.[15] In 1738 the committee of grievances reported as follows: "Your Committee likewise

[11] Lower House Journal, May 25, 1719; April 8, 1720.

[12] Ibid., September 26, 1723.

[13] Ibid., October 11, 1725. A committee recommended "That Sommersett County and some others that Cannot make any Quantity of Tobacco or Flax, may have the Liberty of paying their Publick Dues in Country Commodities."

[14] Acts of 1733; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 323: 12), T 23; Bacon, 1733, ch. 6.

[15] Upper House Journal, March 31, 1736; Lower House Journal, April 8, 22, 1736; May 11, 12, 30, 1739.

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most humbly observe that maney poor Tradesmen, Artificers, Labourers and others throughout this Province making no Tobacco, execute their Trade Artifice Labour or other business for the current Money of the Province, yet by the said Ministers Officers and other Deputies are charged such Fees in Tobacco, which they having not to comply or able to procure, are necessitated and tortiously compelled to pay for the Same excessive and exhorbitant prices in such Current Money to the ruin of Many Families and their intire Extirpation out of this Province and discouragement of those who remain to follow such their useful Arts Labour and Industry."[16] It was on the frontier of what is now Frederick County, where little tobacco was raised, that the situation became most acute. In 1737 a bill to grant relief to the settlers on the frontier was turned into an attempt grew no tobacco. It failed to pass the Upper House.[17] In to lighten the burden of officers' fees for all colonists who 1739 there was submitted "The Petition of the Inhabitants of the back Parts of Prince George's County and the adjacent Places, praying leave to discharge their Taxes in Money."[18] Again a bill to relieve the inhabitants of the frontiers failed to pass. In the same year there was also an attempt to change the fees of the admiralty court from tobacco into money on the ground that those who resorted to that court were mostly shippers and foreigners, who had no tobacco.[19]

Eight years later, by the tobacco inspection act of 1747, the first effective relief was granted. According to this act all fees and levies were still to be assessed in tobacco, but those who did not grow the crop were allowed to pay all fees and levies in money at the rate of twelve shillings six pence currency per hundred pounds of tobacco, provided payment was made before April 10 yearly, or at the time of the performance of the service for which the fee arose.

[16] Lower House Journal, May 16, 1738.
[17] Ibid., May 11, 12, 13, 1737.
[18] Lower House Journal, May 11, 12, 1739.
[19] Ibid., May 15, 1739.

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This privilege was limited strictly to those who had grown no tobacco the year before.[20] Similar provisions were included in the tobacco acts of 1754[21] and 1763.[22] In accordance with these laws, from 1747 on it was always possible for individuals who lacked a supply of tobacco to meet all public obligations in other currencies.

The second way in which the supply of tobacco varied was between the different seasons. Tobacco was usually planted in April and housed in September, and some of it might be sufficiently cured by the middle of November; but since it could be stripped and packed only in damp weather, usually all winter and frequently most of the following summer were required to get a crop ready for shipment. Obviously, it would assist a man little in the payment of a debt to have a barn fairly bursting with tobacco if it was not packed or in condition to be transferred. Therefore it was only between the middle of November—the earliest date at which any amount of tobacco could be cured and prepared—and the end of August, when the last ships usually sailed, that any one could be expected to have on hand sufficient tobacco to meet a debt. Moreover, for market reasons, constant encouragement was given to the early shipper, and if an industrious planter managed to send off his crop by the middle of April, he might be solvent and still not be able to pay a small tobacco debt unexpectedly brought against him the first of June. Such a state of affairs forced all tobacco transactions to take place only during the winter or the early spring months. Tobacco debts were regulated to fall due at these times. Merchants permitted planters to run accounts all the year and to pay up by the transfer of the tobacco crop after it was ready in the spring or summer.

[20] Acts of 1747, p. 8.

[21] Acts of 1754.

[22] Bacon, 1763, ch. 18. Speaking of this alternative payment when it was being attacked in 1763, the Lower House said: "This alternative is one of the most valuable Parts of the Law. The Quantity of our Staple was too great, and this was the Measure fallen upon to reduce it; when this alternative is in Effect taken away, the People must again have Recourse to making Tobacco" (Lower House Journal, October 31, 1763).

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Occasional transactions in the off season were accomplished almost exclusively by promissory notes payable "by the going out of Capt. Grindall,"[23] or at some other convenient time.[24]

It would have been a hardship indeed had the law permitted creditors to sue and execute for tobacco debts at unseasonable times. In the code of 1715 it was provided that "after the Tenth Day of May in any Year, no Execution shall issue out of any Court of this Province, against the Body or Goods of any Person or Persons inhabiting within this Province till the Tenth Day of November next," upon condition, however, that a debtor, to prevent execution, should give to the creditor a confessed judgment, with two good sureties to guarantee payment during the next open season.[25] In 1721 this provision was extended to certain other courts that had been construed out of the general clause.[26] November 10 was felt to be somewhat too early for the indolent planters, and in 1728 the season for executions was narrowed by forbidding them before February 10.[27] From this time on no execution could be laid except during the three months between February 10 and May 10 of each year.[28]

The regulation of tenders and executions successfully remedied the chief difficulties arising from seasonal fluctuations in the tobacco supply; but variation between different years was not so easily overcome. Like all other crops, tobacco has good years and bad years. It was a serious hardship for one who had contracted a tobacco debt during a

[23] Baltimore County, Court Records, June, 1745, Liber TB No. C, p. 553.

[24] For example of note transactions see Lower House Journal, May 12, 1737.

[25] Bacon, 1715, ch. 33. Though the trouble lay only in tobacco debts, this act was made general and applied to all debts.

[26] Bacon, 1721, ch. 4.

[27] Ibid., 1728, ch. 24.

[28] So strong was the influence of foreign trade over the colony that money contracts were commonly made payable by the going out of the ships, which was in midsummer; but these debts also were attracted into a regulation similar to that for tobacco contracts (Bacon, 1721, ch. 4; Lower House Journal, July 27, 1721).

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year of plenty to be called upon for payment during a year of scarcity. So grievous was the difficulty at times that special acts were passed relieving the pressure. The most notable instance was in 1724 and 1725. Crops seem to have been poor in both 1722 and 1723, and in 1724 the drought was such that there was almost no tobacco produced at all. In the fall of 1724, therefore, the legislature passed an act permitting all persons who had not enough tobacco for taxes to make oath to that fact and have their liability for taxes postponed for one year. After it was found what proportion of the taxes was thus postponed, the same proportion of all public debts was to be repudiated for the year. An oath of inability to pay was also to supersede all executions for officers' fees and private debts for one year.[29] Some irregularities seem to have been practiced in the administration of the law, and an additional act was passed in 1725 continuing still longer the immunity from execution in some cases.[30]

The several peculiarities in the supply of tobacco would have been of less consequence had tobacco possessed the second requirement for a monetary medium,—durability. A more durable substance could have been accumulated from year to year, and the failure of a single crop would not have left the colony entirely without money. Tobacco, however, decreased in value so rapidly if held over a season that practically the entire crop was shipped every summer, thus forcing the colony to produce an entirely new money supply each year. The failure to meet the test of durability was the most serious handicap on tobacco as a circulating medium.

In respect to portability tobacco had two serious defects. So brittle is the cured leaf that only in damp weather can it be handled at all, and even then it shatters so badly as to make each handling result in an appreciable loss. Further-

[29] Lower House Journal, October 8, 17, 30, 1724; Upper House Journal, October 9, 20, 28, 29, 1724. Only the title of the act is preserved. There seem to have been some other provisions for the payment of money instead of tobacco.

[30] Bacon, 1725, ch. 3; W. Parks, Collection of the Laws of Maryland, p. 273.

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more, the great weight and even greater mass of tobacco money made transportation a mechanical difficulty so serious that the place of payment formed an essential part of every contract. A government contract in 1722 failed of reasonable bids largely because the enabling resolution did not specify the place of payment.[31] To meet this condition some interesting laws and customs came into vogue.

Since the ownership of tobacco passed through very few hands between the field and the ship, it was frequently found convenient not to move a crop except when it was loaded aboard a vessel. The merchant or other receiver of tobacco came to each plantation and had the proper amounts weighed out, packed into hogsheads, and marked with his own name. The tobacco was then stowed away in the planter's barn, where the planter was compelled by law to keep it for a whole year or until the receiver saw fit to have it removed. Every planter was required by law to have for this purpose sufficient storage space, properly roofed and securely locked, and all loss by weather or theft due to inadequate housing was to be sustained by the planter. During the period of storage marked tobacco could not be levied on by the sheriff for the planter's debts except in payment of the public levies or the minister's salary.[32] If the original payee transferred this tobacco to another, the exchange was effected when the new owner marked out the first name on the hogshead and substituted his own. When a tobacco receiver was ready to ship his consignment, he sent to the various plantations where his tobacco was stored and ordered that it be delivered to the several nearby landings, from which it was taken by lighters and loaded on the vessel. Thus were avoided not only the expense and difficulty of several removals of the tobacco, but also the necessity on the part of the merchants of maintaining warehouses to store the tremendous amount of tobacco that some of them received.[33]

[31] Upper House Journal, October 30, 1722.
[32] Bacon, 1715, ch. 46.
[33] Ibid., ch. 22.

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Another device employed to facilitate transfers of such bulky money was the tobacco note. The promissory note mentioned above was an arrangement to obviate certain difficulties arising from the seasonal nature of the tobacco supply rather than a part of the machinery of exchange, although it did to some extent fulfil the latter function. A more direct exchange instrument was the written order to the planter in whose barn marked tobacco was stored requiring him to change the name on the hogshead.

In 1747 all previous customs and all regulations concerning the transportation and storage of tobacco were entirely swept away and a new system was introduced by the establishment of public warehouses to which all tobacco had to be sent before shipment. On the delivery of a crop at the warehouse, the planter was supplied at his option either with a non-transferable receipt or with one or more transferable notes stating the amount, condition, and quality[84] of the tobacco received. These notes called for the delivery to the bearer of the tobacco specified, and passed freely from hand to hand almost like cash. A writer in the Maryland Gazette about seven years after the enactment of the law said: "I then considered the Advantage of having Tobacco Notes in my Pocket, as giving me Credit for the Quantity mentioned in them wherever I went, and that I was thereby at large to dispose of them when, to whom, and where I pleased; whereas, before this Act, my Credit could not be expected to go beyond my own Neighbourhood, or at fartherest, where I might be known."[85] The law required that all tenders of tobacco, to be legal, be made in transfer notes, and all levies and fees were accepted only in this form. The element of transportation, however, was not entirely eliminated, as the location of the warehouse in which the tobacco was lodged was still a matter of importance. Levies had to

[84] Speaking of transferred tobacco, about one third of the whole, Callister said: "the Inspectors will not trouble themselves to distinguish the quality in their Notes, & as often Phaps are not capable to distinguish or if they undertook it, as little to be relied on" (Callister MSS., July 9, 1751).

[85] April 5, 1753.

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be paid in notes on some warehouse in the county or parish where they were due, and officers' and lawyers' fees in notes on some warehouse in the county where the debtor lived. From 1747 to the end of the colonial period tobacco payments were rendered easy by this regulation. It was the most important single device employed to facilitate the use of tobacco as money.[36]

The public inspection before the delivery of tobacco notes tended also to correct another fault in the tobacco medium, that is, lack of homogeneity. Scarcely any two crops of tobacco were of exactly the same quality, and, even when they were about equal in grade, differences in curing and packing might cause a wide disparity in value. One crop might be more shattered than another. One planter might pack a larger percentage of the scrubby ground leaf, while another might conceal a large quantity of stems, dirt, or brickbats in the middle of his hogshead. If tobacco had been merely a crop to be sold for the market price, careless and fraudulent handling would have brought loss only to the planter; but since it passed as money, a pound just fit to be accepted was worth as much to the planter as a pound of the best leaf, and the more dirt he could include in a hogshead without causing its rejection, the easier would be the payment of his debts. Regulations of quality, consequently, form a large part of the tobacco code.

False packing was stringently prohibited. A fine of one thousand pounds of tobacco per hogshead was provided by the code of 1715 for every person who "shall use any fallacious . . . Practices to conceal or hide any Frost-bitten, trashy Ground-Leaves, or small Scrubs, or any Stalks, Stems, Wood, Stones, Dirt, or any other manner of Trash, or old decayed Tobacco, in the inward parts of such Hogshead, where the Generality of such Tobacco as shall be packed in the outward parts is good, sound and merchantable; or shall be deemed or adjudged by the Court or Jury before whom such matter shall be Tried or called in Ques-

[36] Acts of 1747, pp. 11, 13.

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tion, that such Packing falls within the ancient common received notion of what false packing has been hitherto reputed to be; and any such hogshead or cask of Tobacco pay or offer or tender to pay away."[87] Almost every subsequent tobacco act down to 1747 carried its provision against false packing.

The greatest difficulties arose over the including of ground leaves and "seconds." After the tobacco stalks have been cut, a few extra leaves of a coarse fibre will spring up quickly on the stump left in the ground, and many planters harvested these leaves and cured them with the regular crop. The coarseness of the leaf and the extreme danger that such a late harvest would be touched with frost made seconds a very undesirable product. Many unavailing efforts were put forth to prevent the packing of these low grades. The first enactment that met with any degree of success seems to have been the paper-money act of 1733. By that law every planter was required to burn in the presence of inspectors appointed for the purpose one hundred and fifty pounds of his worst tobacco for every taxable person[88] that worked in his fields. A fine of twenty shillings was imposed for every hundred and fifty pounds of tobacco not so burned.[89] Even this act was not an unqualified success, and the problem was still unsolved when the inspection act of 1747 put all tobacco questions on a new basis.

In dealing with a money of such doubtful nature creditors had to protect themselves, and it is not to be supposed that they depended solely on the law. Sheriffs and others who received tobacco payments seem to have scrutinized each hogshead very carefully before accepting it. Even then, however, without seeing a hogshead entirely unpacked it was difficult to be certain that there was no scrubby leaf in it. Some merchants employed expert in-

[87] Bacon, 1715, ch. 22.

[88] All persons above sixteen years of age except free white women were counted as taxables.

[89] Acts of 1733; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 5: 1269), T 23; Bacon, 1733, ch. 6.

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spectors to examine all tobacco offered in payment,[40] and some were so careful that they maintained regular inspection houses of their own, where all tobacco was unpacked and graded before it was accepted.[41] In some cases this private inspection of tobacco was so abused that a creditor in a favorable position, such as a landlord, was able to cull out the best of a debtor's crop.[42]

Previous to 1713 creditors seem to have had the right to accept or reject tobacco without restraint. An act of that year recites that creditors often reject or delay in receiving good tobacco, and the debtor, being afraid to dispose of it for fear of its being demanded, is compelled to hold it subject to casualty and depreciation. The act provides that if between November and March 31—the legal period for tenders in tobacco—a debtor's offer is rejected, he may apply to a justice of the peace, who shall appoint two inspectors to view the tobacco; if found good, it shall be marked and kept one year at the order of the creditor as payment of the debt.[43] This seems not to have been an entirely satisfactory solution of the problem, for in 1724 the committee of grievances complained that sheriffs were rejecting good tobacco as a pretence for execution in order to gain the additional execution fees.[44] An act of the same session enlarging the time for tenders in tobacco may have had something to do with this matter,[45] for no more complaints of such practices by sheriffs are heard.

By the tobacco act of 1747 all these provisions and the former methods of dealing were swept away, and an ideal

[40] Letter from "Q in the Corner," in Maryland Gazette, April 28, 1747.

[41] "Before the making the Law [of 1747] it is certain, and well known, that some Merchants obliged the Planters to carry the Tobacco they agreed with them for, to Places where they kept Weights and Scales, and would not receive it 'till it had been examined by a Receiver and weighed in the Scales; this Fact cannot be denied" (Maryland Gazette, April 5, 1753). See also ibid., June 2, 1747; June 7, 1753.

[42] Ibid., July 12, 1753.

[43] Bacon, 1713, ch. 3.

[44] Lower House Journal, October 14, 1724.

[45] Bacon, 1724, ch. 6.

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system of grading was substituted. The public inspector, an expert judge of tobacco, was set up to examine all crops and, by personally repacking each hogshead, to make certain that no deceit was practiced. As the tobacco notes issued by the inspectors told the weight, quality,[46] and condition of the hogshead, there could no longer be any doubt in the mind of the receiver as to the coin in which he was being paid. With efficient administration this act furnished the best possible arrangement for correcting the defective homogeneity of tobacco money.[47]

In point of divisibility tobacco was all that could be desired, but excellence in this respect was offset by defects in other regards. Although easily separated into very small parcels, tobacco when so divided rapidly declined in value. Lack of durability was responsible for this condition. In the first place, the amount of handling necessary to break up a crop into small lots and to transfer these lots from man to man was so injurious to the tobacco that its value was much diminished. In the second place, since tobacco depended for its value upon shipment abroad, and since shipment was profitable only in large amounts, the acceptance of one small parcel entailed the necessity of procuring enough more to constitute a consignment or else the first parcel became valueless. These considerations rendered small tobacco transactions comparatively rare.

The last, and in some ways the most important, quality that a good monetary substance should possess is stability of value. In this respect, also, tobacco failed. Fluctuations in price were frequent and violent. For example, the year 1720 fell in a period of very cheap tobacco. Overproduction had stocked the foreign market to overflowing, and as early as 1711 prices had fallen so low that a minister complained to his bishop that "Tobacco, our money, is worth nothing, and not a Shirt to be had for Tobacco this year in all our

[46] Except of "transfer" tobacco (that which was paid away in small parcels), as transfer hogsheads were composed of various parcels of differing quality.

[47] Laws of 1747, p. 8.

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county."[48] Tobacco remained at this low ebb until 1724, when, failure of the crop sending prices soaring, a relief act had to be passed permitting the suspension of payments for a year. Prices gradually fell back into their old rates, and another period of depression set in. In 1734 another failure of the crop made tobacco so valuable that, whereas it had been selling for about ten shillings per hundred pounds, planters were willing to pay a fine of twenty shillings rather than burn the hundred and fifty pounds of trash required by law.[49] The war period of 1739 to 1748 was in general a time of cheap tobacco. Both the tobacco act and the declaration of peace went into effect in 1748 and sent tobacco prices up again for a short while.[50] From that time on to the end of the colonial period the value seems never to have fallen quite so low as it did before the days of public inspection; but it still fluctuated with changing conditions, especially showing much depression during the long French War. These fluctuations were so great that prices sometimes doubled in a single season.

Such a variable money furnished no standard of value and left business on an exceedingly precarious basis. It was the uncertainty of price as well as of place of payment that prevented reasonable bids on a government contract in 1722.[51] An example of the hardships caused by fluctuations in the value of tobacco money is shown in a dispute between Henry Callister and a neighbor named Maxwell, in which complaint was made "that tobacco had risen 50 per cent currency from the time I borrow'd till I paid."[52] Debtors naturally took advantage of the years of cheap tobacco to pay off their debts, and put forth all sorts of excuses for not paying in years of high prices. At times the Lower House of Assembly countenanced this sort of trickery by smoothing the

[48] E. Ingle, "Parish Institutions of Maryland," in Johns Hopkins University Studies, vol. 1, no. 6, p. 9 n.
[49] Acts of 1734, p. 6.
[50] Callister MSS., November 12, 1749; Maryland Gazette, April 5, 1753.
[51] Upper House Journal, October 30, 1722; see above, page 57.
[52] Callister MSS., June 23, 1759.

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way wherever it was possible for delaying payments in scarce years. An ironical advertisement, apparently written by Henry Callister, refers to certain proceedings of the assembly of 1759 directed toward this end. It advises people not to pay foreigners' debts while they still have credit in the country, and when they can go no further, to rely on the courts as composed of fellow-countrymen and they will be freed of all obligations to foreigners. It might be good policy to remit a few bills now and then, so they can be protested, but people are not to think of paying debts while tobacco is high and goods are cheap.[53]

The credit system rested upon an unstable basis. Merchants supplied the planters with goods on account throughout the year, and received payment out of the crop when it was packed in the spring or summer. To some extent they bargained for a commodity of the value of which they could have no idea. It was not until after the middle of August that an estimate could be made of the size of the crop and, consequently, of the course of prices. If the crop was large, values of goods throughout the rest of the summer and on to the next spring could be raised to allow for the cheapness of the tobacco in which payments would be made. If the crop was seen to be a failure, prices would be lowered to attract as much as possible of the valuable tobacco. Factors kept their principals closely informed of the weather conditions and crop prospects, that goods might be selected and prices set with the greatest possible intelligence.[54] Notwithstanding the best efforts of the merchants, however, the purchase of tobacco with goods nearly a year before the delivery of the crop was a very hazardous business.

In order to avoid the risks of dealing in tobacco for future delivery, many merchants began about the middle of the century to mark their goods in a new way. All goods were priced in the stores at their sterling cost in England. When

[53] Bound letters, Maryland Diocesan Library, No. 44.

[54] For examples of such reports see Callister MSS., May 4, August 21, 1746; February 23, 1746/7; December 28, 1747; August 8, 1748; and passim.

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the tobacco was offered in payment of accounts in this "sterling goods" standard, the price of the tobacco was made sufficiently low to allow for overhead charges and profits. If the account was settled by the payment of money instead of tobacco, the total was always increased from fifty to a hundred per cent. The ledgers of many merchants show a "sterling goods" column as well as "sterling," "currency," and "tobacco" columns. The same article when charged in the "currency" column is usually at double the price that it bears in the "sterling goods" column.[55] With money exchanging at £166⅔ currency for £100 sterling, it is evident that two thirds of the advance is exchange and one third profit, making a profit on the original outlay of twenty per cent. The "sterling goods" method of keeping accounts had the appearance of a new standard of value, in which the goods set the standard and the tobacco was the commodity purchased. In reality, however, the whole system was merely a safe method of employing tobacco as currency in deferred payments by counteracting the effect of variations in price.

Along with the natural changes in the price of tobacco there must be considered also the artificial variations caused by legislation. It was clearly seen by the colonists that the economic depression of the province was caused partly by overproduction and partly by the poor quality of tobacco shipped. Efforts for improvement, therefore, were largely directed, first, toward limitation of the product, and, second,

[55] See numerous ledgers in the Library of Congress, Firm Accounts, Maryland and Virginia. Agreements like the following are found at the ends of some accounts in these ledgers: "1761 Sept[r] 28. Then we the Subscribers Settl'd Accompts 'till this date and after Examination finds a Ballance of Forty Nine Pounds, Sixteen Shillings Currency (payable as by Inspection Law) due Edward Smoot —And a Ballance of One hundred Pounds Crop Tobacco, And Twenty Six Pounds, Eighteen Shillings and Six Pence Three farthings Cost in Sterling Goods due by said Smoot to Thomas Francis & Company which Ballance of Sterling Goods is to be discharged by Edward Smoot in Crop Tobacco, When the Inspection Opens in 1761—and in the year 1762—and he is to have the Price that Cap[t]. Francis gives in first Cost of Goods in 1762 provided the whole tobacco is paid that year" (Ledger 1761, p. 368).

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toward the prevention of the shipping of trash. In either case the passage of a tobacco act meant the curtailment of the amount of tobacco money that a planter might actually spend. Since debts were fixed in terms of tobacco, it was felt that they would be made much more burdensome if the planter was limited in the amount that he might produce or the proportion that he might ship. Moreover, as all legislation was intended to raise the price, it was further believed that the actual value of the tobacco paid on a debt would be increased if restrictions were placed upon the crop. For these reasons, every tobacco act was accompanied by an attempt to scale down tobacco debts so that the value paid under the act would be about equal to the value as it would have been had no such act been passed. The only time that such legislation was actually put in force was in 1747. By the tobacco inspection act of that year all outstanding tobacco debts that should be paid in inspected tobacco were reduced one fourth; the ministers' salaries were reduced from forty pounds to thirty pounds of tobacco per taxable; and a reduced scale was established for officers' and lawyers' fees. In this instance tampering with contracts proved a wise measure, for, owing to the combined effect of the regulation and the peace of 1748, the price of tobacco rose even more than a fourth during the next few years. On the other hand, the expiration of beneficial legislation would have as serious effects as its enactment. When, therefore, in 1753 it looked as if the act of 1747 might be allowed to lapse, merchants tried to collect all outstanding debts so as to carry no accounts over to the period of cheaper tobacco which seemed imminent.[56]

It is hardly too much to assert that artificial variations, real and threatened, in the price of tobacco caused as much anxiety and nearly as much hardship as variations from

[56] Advertisement by Richard Snowden (Maryland Gazette, April 5, 1753). Henry Callister feared that if the act was not continued there would be little prospect of any addition to tobacco debts, and suggested that two or three such enactments and repeals would wipe out debts altogether (Callister MSS., July 9, 1751).

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natural causes. There was no possible remedy for these fluctuations, and not even any means of making public what might be a proper rate for tobacco at any given time. An interesting experiment along this line was conducted by the court of Charles County. At its March meeting this court settled the current price of tobacco for the ensuing year.[57] This declared price, of course, was binding only on the charges of public houses[58] and ferries, and, possibly, on the county fines and levies, should such be paid in money. Yet in spite of the apparent merits of such a system, no other counties seem ever to have adopted it.[59] In ordinary transactions, custom seems to have played a prominent rôle, and even without any determination by the court, prices were very apt to become fixed at some round figure. The favorite rates per 100 pounds were 8s. 4d. (1d. per pound); 10 shillings; 12s. 6d. (1½d. per pound); 16s. 8d. (2d. per pound); and 20 shillings. Perhaps four fifths of the occasional transactions of a given season would be at some one of these figures.[60] In the dealings of merchants, however, the marking of the goods fixed the price of tobacco on accounts kept in tobacco,[61] and ordinary competition set the price on accounts kept in "sterling goods" and on purchased tobacco. It is probable, therefore, that there was less petty shifting of price and fewer discriminations between individual planters than the uncertainties of the system seem to make possible.

Far from filling the requirements for a good monetary substance, it is evident that tobacco was defective at almost every point. The supply was not well distributed among individuals, it was seasonal, and it varied widely between different years. The material itself was perishable, and this,

[57] Charles County, Court Records, March sessions.

[58] After the assessment of public-house charges in money for 1725 is the following statement: "To be Discharged in Money (if paid ready Down) or tobacco at the rate wch shall be assest by the Justices here in March court next" (Charles County, Court Records, August, 1725, Liber P No. 2, vol. 35, p. 65).

[59] The records of Calvert and St. Mary's Counties are lost.

[60] In the inventories these figures constantly recur.

[61] Callister MSS.

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in conjunction with its great bulk, rendered it so difficult to transport that storage laws and tobacco notes were indispensable. So great were the differences in quality, curing, and packing that standardization was impossible, and an expensive public inspection system had ultimately to be established. Though highly divisible, defects in homogeneity and durability rendered this quality useless. Finally, its value was so fluctuating that it furnished no standard of value and led to much hardship in cases of deferred payments. Legislation had eased most of the difficulties arising from the other deficiencies, but this last defect defied all efforts to find a remedy.

One other count must be added to the indictment against this form of money. Tobacco served not only as currency, but also as the staple product of the colony, and it soon developed that regulation of this substance as money was often incompatible with its regulation as a staple product. Thus, when tobacco had long been selling at from eight to ten shillings currency per hundred pounds, it was wise, as far as the commodity was concerned, to adopt heroic measures to raise the price; but at the same time, as a money it was also wise to keep its prices unchanged for the sake of outstanding contracts. Every one in the colony, except possibly a few short-sighted buyers, was desirous of seeing tobacco as a commodity advance in value, but at the same time there were two clearly distinguished opinions as to its value as money. All creditors and all those who, like the clergy, the lawyers, and the officers, had fixed incomes in tobacco were very anxious to have prices advance. All debtors, however, and all who had to pay the fees to the official classes were interested in having tobacco remain low or even sink lower in value. These two classes were represented closely in the two houses of the legislature, the Lower House representing the people, the debtor class, and the Upper House representing the official or creditor class. Every tobacco-improvement bill, therefore, to gain any consideration in the Lower House had to carry some provision

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for scaling down fees and debts to allow for the anticipated rise in value; and at the same time the Upper House was very loath indeed to permit reductions to be made while the advance in price was still uncertain.

On this rock many a promising piece of tobacco legislation went to pieces. From 1720 to 1747 almost every legislature took into consideration some proposed tobacco act. In 1728 a bill succeeded at last in avoiding both of the difficulties. Among other provisions for regulating the trade was a clause reducing all tobacco fees and debts by one fourth, if paid in inspected tobacco, and allowing an alternative payment of officers' fees and rectors' salaries in money at ten shillings per hundred pounds, thus providing that, whatever price tobacco might reach, fees could never rise above their value at ten shillings per hundred.[62] The act was being put in force when in 1730 the violent protests of the clergy brought upon it the proprietor's veto.[63] For seventeen years longer the controversy continued, and in consequence the tobacco trade remained without any effective regulation. Only the direst necessity on the part of the province, and the conviction that a tobacco act, though it might reduce the amount of the fees, would increase their value ultimately, brought the two parties to a rational consideration of the subject.[64] Finally, in 1747, the inspection law was passed. This act reduced fees and debts in accordance with the demands of the Lower House, but it also put tobacco under such stringent regulation that the advance in price more than made good the reduction. Thus for about twenty-five years the use of tobacco as money blocked all legislation concerning its treatment as a commodity, and entailed on the colony for that period of time extreme business depression.

It was but natural that, seeing the disadvantages of to-

[62] Upper House Journal, November 2, 1728; Lower House Journal, July 30, 1729.

[63] Lower House Journal, May 26, 1730.

[64] The situation is set forth in an address to the proprietor from the governor and the council (Archives, vol. xxviii, pp. 308–310).

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bacco currency, the colonists should have tried to get away from such a system. Before 1720 inroads were being made on the monetary position of tobacco. In 1706 there was passed an act making hemp and flax payable for debts. This, of course, was as much for the encouragement of the culture of those products as for the discouragement of tobacco money.[65] For many years an act of 1715 made all sorts of produce ultimately payable for tobacco debts after execution. The members of the legislature by 1720 were being paid in either tobacco or money at their option.[66] Toward 1730 a movement against tobacco currency gathered considerable momentum. Several petitions asking for the privilege of paying fees and levies in money instead of tobacco reached the legislature, but nothing was done.[67] In an open letter from the London tobacco merchants to the people of Maryland in 1729 the use of tobacco money was singled out for attack, and the colonists were advised to give up this sort of barter and go on a cash basis.[68] It was generally thought that the use of tobacco as currency was in some indefinable way responsible for the fact that Maryland remained an agricultural community and did not develop a trade like that of the northern colonies. The paper-money act of 1733, which grew out of this feeling, was, as its preamble states, an effort to free the colony from the grasp of tobacco money, but the experiment was only partially successful. Tobacco remained the money of fees and levies, and it also continued to be the medium of most commercial transactions. Except for the provision of the tobacco inspection act of 1747 permitting those who grew no tobacco to pay public levies and fees in currency, there was no further change in the status of tobacco money during the entire period under discussion.

Though legislative attacks were largely futile, tobacco money began to lose its hold in some parts of the province about the middle of the eighteenth century. Since it de-

[65] Upper House Journal, August 3, 1721.
[66] Lower House Journal, April 20, 1720.
[67] Ibid., October 11, 1725.
[68] Maryland Gazette, April 15, 1729.

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pended upon the simple relationship between planter and merchant for its utility as money, when this relationship ceased to exist the usefulness of tobacco inevitably declined. As a community came more and more to depend on grain raising to supply its needs, all former commercial connections were gradually sundered. The grain buyer was engaged in the West India trade and had no way of disposing of tobacco. Moreover, he was not always an importer, and preferred to purchase grain for cash. Thus, with the advent of grain culture there came a new business field in which tobacco money had no place.

As early as 1725 there are evidences of the breaking down of this kind of currency at the two extremes of the Eastern Shore. The committee of grievances recommended "That Sommersett County and Some others that Cannot make any Quantity of Tobacco or Flax, may have the Liberty of paying their Publick Dues in Country Commodities;" and at the same time they reported a grievance from Cecil County "That officers fees are Rated in Tobacco and that in Scarce Years they Exact Treble the Value viz. Twenty Shillings Sterling Pr. hundred & so always at an uncertainty, whereas if officers' fees and other Publick Dues were Rated in Money to be paid at a price Current in Tobacco or what 'twould be reduced to a Certainty."[69] Evidently both these sections were already abandoning the use of tobacco money, but from the very causes here set forth they were unable to get entirely away from the system. Until the passage of the inspection act of 1747 it continued to be almost a necessity to produce some tobacco in order to meet public charges. The paper-money issue of 1733 undoubtedly furthered the abandonment of tobacco money. About 1745 the merchants in some sections began to transfer their accounts from tobacco to money. Henry Callister, a merchant of Talbot County, writing about this time said: "Our method is new, we rate every article in Papr Mony at abt. 300 Pct. advance on the prime Cost & buy Tobo with this Mony debt dis-

[69] Lower House Journal, October 11, 1725.

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counted as above or with Paper Mony bought the same way. By this method we shall lessen our Tobacco debts, & all our dealings will be more certain, we shall know what we are doing and make them [the planters] know likewise."[70] The tobacco act some two years later asserted that "several, or most, of the Traders within this Province keep their Books in Money, tho' in truth their Dealings have been for Tobacco, and that the Intention both of Creditor and Debtor hath been, that the Payment should be made in Tobacco."[71]

About 1750, therefore, the change seems to have become more or less general, but an alteration in accounting does not necessarily denote a change in the method of dealing. Many records show, however, not only a change in bookkeeping, but also a change in the manner of payment. A ledger from the upper part of Baltimore (now Harford) County in 1750 shows trade almost entirely in terms of money and tobacco. Another, of 1756, shows a decrease in the tobacco entries and some entries in grain. Ledgers after 1760 show practically no tobacco.[72] On the two ends of the Eastern Shore after 1755 tobacco is rarely mentioned as a credit on an account between merchant and planter. Grain sometimes appears, but money is more frequent. For instance, the volume of Cecil County court records covering the years 1761 and 1762 shows no traces of tobacco except in fines, which were by law assessed in tobacco, though probably paid in money. Evidently by 1765 the use of tobacco as money was rapidly dying out in some sections.

Though very little record remains, it is probable that the back-country trade centering in the young town of Baltimore was also on a cash basis. The transportation of tobacco from the Monocacy to the Patapsco was such a difficult task that it is safe to conclude, in the absence of all evidence to the contrary, that no tobacco was ever so transported. In fact, the back parts of Frederick and Baltimore

[70] Callister MSS., about 1745.
[71] Acts of 1747, p. 3c.
[72] Ledgers A, G, and F of Aquila Hall, and the ledger of Thomas Archer (Harford County Historical Society).

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Counties were so remote that little tobacco seems to have been raised there. This western trade, which was destined very shortly to become the most important in Maryland, seems never to have felt the trammels of tobacco currency.

Thus by 1765 the use of tobacco as money was clearly decadent. Important courses of trade were coming into existence on a money basis, and old tobacco regions were giving up not only the monetary circulation, but even the culture of the plant. Only the central part of the Eastern Shore and the tide-water regions of the Western Shore were still transacting their business in terms of tobacco.

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CHAPTER IV

Barter

In colonial Maryland the same conditions that made for the rise of tobacco currency favored also exchange by barter. The scarcity of coin was so great that all sorts of substitutes were welcomed. Moreover, much of the trade was of a very direct nature, all the manufactures passing in one direction and all the produce of the soil passing in the other, and it was a very simple matter for merchant and planter to exchange directly without the intervention of any circulating medium. As has been shown, the circulation of tobacco was to a large extent merely barter rather than real circulation. In localities and in individual cases where the planter had crops other than tobacco, those other products were frequently traded off very much in the same way as tobacco was, and constituted a sort of barter currency.

Of the prevalence of barter in Maryland there is abundant evidence. Advertisements in the newspapers mentioned the produce that would be accepted in exchange. In 1729 Daniel Dulany advertised land to be let out with the rent payable in tobacco, corn, wheat, or other produce.[1] At another time a house and lot were advertised for sale for ready money, tobacco, wheat, corn, or good bills.[2] Somewhat more general cases were those of Patrick Creagh, a merchant of Annapolis, who advertised his goods for sale for bills, tobacco, current money, good clean barley at three shillings three pence per bushel, wheat at four shillings, corn at two shillings three pence, flour, or ship-bread,[3] and George

[1] Maryland Gazette, April 8, 1729.
[2] Ibid., December 16, 1747.
[3] Ibid., August 10, 1748.

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Rock, an iron manufacturer, who advertised bar iron for ready money or for wheat at the highest market price.[4]

More significant even than advertisements are the many instances of barter shown in private accounts.[5] Rarely does an account in the tobacco sections show a credit in any medium except tobacco, but in those regions where tobacco culture was passing away all sorts of farm produce appear as credits on merchants' accounts against planters. A typical account had the following credits: 1 pistole, 2 bushels of wheat, 108 pounds of beef, and 2 fat hogs weighing 225 pounds.[6] In Dorchester County staves often appear in accounts. Two Somerset County bills carry an agreement "to be paid in Cash or pork @ 10 S. P hundred" and "to be discharged by agreement in Virginia money or bbl. pork @ 40/."[7] Occasionally accounts were kept entirely in terms of wheat or other barter commodities.[8] The frequency of such entries attests the importance of barter in the business of the day.

Barter currency was not confined to the simple rôle of open accounts, but figured also in the more complicated transactions involving notes, bonds, and contracts. A Baltimore County contract of sale of seventy-four acres of land calls for the payment of five thousand pounds of tobacco at one penny per pound and £40 currency in Indian corn at twenty pence per bushel.[9] For a debt which he owed of £20 currency Nehemiah Darmon, of Somerset, obligated himself to pay Henry Lowe 2946 West India hogshead staves

[4] Maryland Gazette, June 10, 1746. The Ridgely Papers also show a letter, written in 1766, which speaks of bargaining for iron in exchange for goods.

[5] Note the assumption of barter in the following: "I would buy pork to barrel, but that I fear the flesh will not be good on account of the abundance of acorns. I mean I would buy with goods" (Callister MSS., November 18, 1760).

[6] Cecil County, Court Records, August, 1723, Liber SK No. 3, p. 24.

[7] Somerset County, Court Records, June, 1735, Liber XA No. Y, p. 48; June, 1749, Liber P, p. 259.

[8] Kent County, Court Records, March, 1748, Liber JS No. 34, p. 469; November, 1749, Liber JS No. 35, p. 323.

[9] Baltimore County, Court Records, March, 1723/4, Liber JS No. TW 3, p. 223.

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delivered at Chapel Landing on Wicomico Creek.[10] Shingles, cider, corn, pork, and wheat are all to be found as the media of payment in promissory notes.[11] These contracts were recognized by the courts, and judgments for commodities are occasionally mentioned.[12]

The legislature of the colony recognized the use of barter currency only in certain exceptional cases. During the early years of the eighteenth century the culture of flax and hemp was being encouraged in the hope that they might develop into staples. Consequently, in order to give these products all the favors that tobacco enjoyed, it was enacted in 1706 that properly cured flax and hemp at six pence and nine pence per pound respectively should be legal tender for one fourth of any debt.[13] In 1724 this act was amended in some details. The debates at that time show the Upper House taking special care to protect the interests of office-holders and merchants against losses which might ensue.[14] The law remained in force throughout the colonial period, but it is impossible to know how often it was put into practical use.

In one other case the assembly gave legal-tender qualities to commodities other than tobacco. In the code of 1715 there was an act making it legal for those who lacked specie to pay all debts and judgments, except those due to British merchants and those arising from foreign bills of exchange, in the following commodities if produced within the colony: beef and bacon at 1½d. per pound, pork at 2d., dried beef at 3d., wheat and peas at 3s. 6d. per bushel, oats and barley at

[10] Somerset County, Court Records, November, 1756, Liber 1754–1756, p. 225.

[11] Somerset County, Court Records, August, 1756, Liber 1754–1756, p. 212; March, 1748/9, Liber P, p. 226; March, 1750/1, Liber 1749–1751, p. 263; Baltimore County, Court Records, June, 1725, Liber JS No. TW 4, p. 249; Dorchester County, Court Records, August, 1733, p. 22; Cecil County, Court Records, November, 1742, p. 160; Baltimore County, Administration Accounts, 1759, Liber D4, p. 280.

[12] Cecil County, Court Records, March, 1760, Liber FK No 3, p. 257; Baltimore County, Court Records, November, 1733, Liber JWS No. 9, p. 155; March, 1718/9, Liber JS No. C, p. 106.

[13] Bacon, 1706, ch. 11; Parks, p. 47.

[14] Lower House Journal, October 26, 31, November 3, 4, 1724; Bacon, 1724, ch. 12.

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2s., Indian corn at 20d., and beans at 2s. 6d. In the payment of tobacco debts tobacco was to be rated at one penny per pound.[15] Though the wording of this act seems to imply that the debtor might be sent to prison before these articles would have to be accepted by the creditor, yet the act does not specifically state such a condition, and the effect was to make these products practically legal tender. In 1722 the law was changed so as to require imprisonment of the debtor before acceptance of the commodities. The price of oats was raised to two shillings, debts for borrowed money were excluded, and the debtor was required to make oath that he had not, and could not procure, specie with which to pay his debt.[16] This act continued with a slight intermission until 1750. Although under it a creditor might be forced to accept commodities instead of money, yet the debtor was so restricted that the commodities can hardly be said to have been legal tender. Legislation of this character does not seem to have interested the assembly very much in later years, and renewals were always made with little discussion. It is possible that the act was working so satisfactorily that no changes were deemed necessary, but it seems much more probable that the increase of the money supply made the act of less importance to the colony.

In conclusion, transactions by barter seem to have been prevalent in Maryland and to have persisted throughout the colonial period. Between planters, or between planters and local merchants the arrangement appears to have been fairly satisfactory, but in dealings with foreign merchants, and with officials whose fees arose in small amounts all over the province, and also in the payment of taxes the system entirely broke down. In the laws requiring the acceptance of barter commodities an exception was always made in favor of foreign merchants.

[15] Calvert Papers, MS., No. 823.
[16] Parks, p. 234.

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CHAPTER V

Paper Currency

Paper money was one of the most prevalent economic phenomena in the history of British America. The scarcity of coin seen in every new country was common to the colonies, and the issue of paper money was their remedy. Fiat money, moreover, was a novelty in the eighteenth century, and its principles and shortcomings were not well understood. From the first issue of paper by Massachusetts in 1690 to the repudiation of the Revolutionary continental currency, the American provinces show a long series of failures in the use of this alluring device. Every mainland British colony and several of the islands participated. Maryland was comparatively late in issuing a paper currency, and, therefore, with the accumulated experience of the other colonies to guide her, she was able to conduct one of the most successful of all these experiments.

In Maryland there were other reasons besides the mere lack of coin that induced the assembly to emit paper money, chief among which were the defects of tobacco currency. Tobacco money, as we have seen, was very poorly distributed among the different classes and localities, was too bulky to be handled, fluctuated in supply with the different seasons, and varied sharply in value. The necessity of providing a supply of tobacco to meet the public demands forced many persons to continue the cultivation of the plant long after conditions made dependence on some other crop desirable. Moreover, the tobacco industry was at an extremely low ebb, and it seemed impossible, as long as tobacco remained a money, to regulate the industry without doing injustice to some of those whose contracts called for tobacco payments. One tobacco bill after another had failed because of this difficulty. The imperative need of efficient regulation of

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the tobacco industry was the most important single reason why Maryland began to issue a paper currency.

Many felt, also, that the use of tobacco money was in some way to blame for the industrial backwardness of the colony, and that a well-supported paper currency would stimulate trade. In this strain Benedict Leonard Calvert wrote in 1729: "Money, or somewhat to answer its Current Effects in trade, is Certainly much wanted here; wee may Barter between one Another our Staple Tobacco, but to Carry on and Inlarge our trade Abroad, & to Invite Artificers, Shipwrights &c to settle amongst us, another species of Currency in payments Seems very desireable; New York, Pennsylvania &c are vastly improved in foreign Trade, as well as home Manufactures, by a Paper Currency; it is that, in lieu of Specific Coin, which Seems to give life, Expedition and Ease to trade and Commerce, this has drawn them into Communitys or Towns, they are daily growing more and more populous, and are Supposed to Increase as proportionably in Credit and riches. . . . When our Tobacco then is Sold at home, whatever is the produce of it, returns not to us in Money, But is either converted into Apparell, Tools or other Conveniences of life; or Else remains there, as it were Dead to us, for where the Staple of a Country, upon foreign Sale, yields no return of Money, to Circulate in Such a Country the want of Such Circulation must leave it almost Inanimate; it is like a Dead Palsie on the publick, Since it can never Exert its members or faculties, in the pursuit of trade and Commerce; An interesting Country and growing people, as this is, and a Staple, at best Uncertain, but of late visibly declining in Value, as Tobacco is; invites the people here to look about and enlarge their foundation in trade, to the which money or Some Currency, which may answer the same uses, is necessary, and the Expedient to Such End, is a Paper Currency."[1]

Both in 1727 and 1728 bills for the establishment of a

[1] Calvert Papers, No. 2, pp. 69-71. A writer in the Maryland Gazette of July 22, 1729, argues that a plentiful supply of money will make interest low, and low interest will force capitalists to

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paper currency were considered by the Lower House,[2] but it was not until 1729 that the movement became really serious. The Maryland Gazette, established about that time in Annapolis, furnished a medium through which was carried on a public discussion of the matter, and in this way the idea obtained a popularity never before enjoyed by any proposed piece of legislation in Maryland. The letter from the London tobacco merchants to the people of Maryland, which advised that the use of tobacco as money be given up, was published in April, and probably helped to arouse interest in the subject. In July several other letters appeared. About this time, too was circulated the poem, Sotweed Redivivus, which also advocated a paper currency.[3]

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invest in lands and trade rather than lend out their money at interest. Therefore, a plentiful money supply will lead to high land values and brisk trade.

[2] Lower House Journal, October 25, 1727; November 1, 1728.

[3] One passage runs as follows:—

"For Remedy, both Houses joyn,
To settle here a Current Coin,
Without Exception, such as may,
Our Publick Dues and Clergy pay.
Grown Wordly wise, unwilling are,
To be put off with Neighbours Fare;
Hold Predial Tythes, secure in Bags,
Better than Paper made of Rags:
The Scribes likewise, and Pharisees,
Infected with the same Disease,
On Paper Money look a squint,
Care not to be made Fools in Print.
Thus what is meant for Publick Good,
I find to be misunderstood,
And taken in the worser Sense,
By those, care not for Paper Pence.
And tho' this Scheme should prove in vain,
The Case to me seems very plain;
Said I to Planter standing by,
And was for Paper Currency:
It's money, be it what it will,
In Tan-Pit coin'd, or Paper-Mill,
That must the hungry Belly fill,
When summon'd to attend the Court,
Held at the Magisterial Port."

An amusing objection to paper money is put into the mouth of one of the opposition:—

"Alledging, Planters, when in drink,
Wou'd light their Pipes with Paper Chink;
And knowing not to read, might be
Impos'd on, by such currency."

—Pp. 39, 42.

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When the assembly met in July, the movement was still vigorous, and the emission of paper money became one of the chief issues of the session. The Lower House passed a bill to emit £24,000 currency in bills which should be legal tender for public levies, fees, and even sterling debts.[4] To this extensive proposition the Upper House refused to agree; but the issue was not fought out between the two houses at this time, as another difficulty had arisen on which there could be no compromise. The Upper House—as was necessary, according to the royal instructions, in all important matters affecting trade—inserted an amendment suspending enforcement of the bill until the proprietor's assent had been received. Now, the Lower House just at this time was engaged in an effort to break down the proprietor's right of veto, and to suspend the enforcement of this act would have been practically an abandonment of its position on the veto. As this was impossible, the paper-money bill was allowed to drop.[5]

During the next three years the currency question was a burning issue. In 1730, apparently without much discussion, the paper-money bill passed the Lower House,[6] but was defeated in the Upper.[7] Whether the difficulty was over the payment of fees and sterling debts in paper or was a continuation of the fight of 1729 we cannot tell. By 1731, however, the Lower House seemed rather docile. It broached the subject by proposing to the Upper House that a joint committee should draft an acceptable bill.[8] After long debates an act was finally passed. It provided for the emission of £36,000 currency in notes, and settled all disputed points agreeably to the wishes of the Upper House. Fees to lawyers only were payable in paper, and the act was not to go into effect until the receipt of the proprietor's

[4] Upper House Journal, Lower House Journal, August 4, 1729.
[5] Calvert Papers, No. 2, p. 69.
[6] Lower House Journal, May 30, 1730.
[7] Upper House Journal, June 10, 1730.
[8] Ibid., July 15, 1731.

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assent.[9] This assent was never received, and the act remained void.[10] In 1732 the whole matter was fought out again. At one time the contest became so heated that the assembly was in serious danger of disbanding.[11] The Lower House agreed that no fees—not even those to lawyers—should be payable in the paper, and, after a short insistence, yielded also on the question of suspending enforcement until the proprietor should have given his assent and procured that of the crown. Even after such sacrifices, a comparatively trivial point—the right of the governor to appoint the commissioners to carry out the act—was allowed to defeat the project.[12] Thus was the plan frustrated for six consecutive years.

In 1733 conditions were more favorable for the passage of a paper-money act. The proprietor was in the colony, and seems to have exerted himself to bring the official classes to accept such a measure. At the very beginning of the debate in the assembly a statement was received from the ministers in which they agreed to accept their salaries in paper provided no reduction was made in the amount.[13] A bill to emit £72,000 in notes was introduced into the Lower House on March 27, and passed to the Upper House on March 29. On the same day a conference committee was appointed, which reported on April 2, and on April 5 the act was passed to final engrossment. In the conference committee one important change was made. The amount of paper money to be issued according to the several bills of the preceding four years had been steadily increasing. The bills of 1729 and 1730 called for only £24,000 currency, that of 1731 was for £36,000, and that of 1732, for £72,000. The original bill of 1733 was also for £72,000; but in the conference committee, in order to provide a greater sum to be

[9] Lower House Journal, August 21, 1731; Laws of Maryland, 1731, pp. 5–16.
[10] Bacon, 1731, ch. 21.
[11] American Weekly Mercury, August 10, 1732.
[12] Lower House Journal, July 26, 27, 29, 31, August 2, 4, 7, 8, 1732.
[13] Upper House Journal, March 30, 1733.

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lent out at interest and thus help pay the expenses of the act, the amount was raised to £90,000 currency.

The treatment accorded to officers' fees and ministers' salaries during the debates is of some importance. Early in the session the clergy had made known their consent to a change of their salaries from tobacco to paper provided no change was made in the amount. The first draft of the bill also included a provision making officers' fees payable in paper. But a disagreement seems to have arisen over giving the debtor the option of payment in either tobacco or paper, as the conferees particularly condemned this plan. In the final act it was settled that officers' fees, clergymen's salaries, and all special assessments for the building or repairing of churches should not be payable in paper money. Although subsequent events show that the Lower House was anxious to provide the option of paying these latter obligations in either paper or tobacco, yet the governor repeatedly charged that house with having defeated the project at this time. Nowhere is the position of either house on this matter clearly set forth. The best explanation seems to be that the Upper House was willing to risk the chance that paper money would maintain its value if all fees and dues were payable in it alone, and stood ready to abolish tobacco payments altogether, but was not willing to permit fees always to be paid in the cheaper medium; the Lower House, on the other hand, feared that, if fees were accepted only in paper, scarcity of this currency might cause hardship, or an advance in its value might increase the fees, which were already too large. Thus was defeated one of the chief objects for which paper currency had been issued, as it was still necessary to produce tobacco in order to meet public obligations, and all campaigns for regulation of tobacco had still to be fought out in the heat of the controversy over officers' fees.[14]

[14] The preamble of the law rehearses the reasons for its enactment: "Whereas the most probable means to enable the people to discharge their taxes, and other engagements now payable in tobacco, otherwise; and to destroy such ordinary and unmerchantable to-

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The main provisions of the act of 1733 were as follows: Paper bills should be printed for £90,000 currency as established by the proclamation of Queen Anne (£133⅓ currency equaled £100 sterling). These bills should be placed in an iron chest with three keys, one key being kept by each of the three commissioners appointed to manage the currency. At the next county court, after the bills had been prepared and signed, thirty shillings was to be paid to every taxable in each county. The remainder of the money might be lent out by the commissioners at four per cent interest on the security of plate, leaseholds, or real estate. All notes remaining in the office after the expiration of one year might be invested in good bills of exchange and remitted to London along with the other money to redeem the paper. Redemption was provided for by the levy of one shilling three pence sterling on every hogshead or cask of tobacco exported, which money was to be sent to London and invested in stock of the Bank of England. To take charge of the London end of the business three tobacco merchants, Hyde, Hunt, and Cruickshank, were named in the act, and authority was granted to the lord proprietor to supervise their actions, to remove any one of them in case of necessity, and to appoint a successor should any one withdraw from the position. Between September 29, 1748, and March 29, 1749, all persons having paper notes in their possession should bring them to the office of the commissioners and receive back two thirds of their value in new notes and one third in sterling bills of exchange at the rate of £133⅓ paper money for £100 sterling. These bills of exchange were to be met by sale of the bank-stock purchased by the tobacco duty. Between the same days of 1764 and 1765 the two thirds of the paper remaining in circulation were to be redeemed in the same way. During their circulation these notes were to be payable for

bacco, which serve only to clog the markets, and depreciate the best sorts of that commodity, as well as to put the people in a condition to carry on the tobacco trade, to the advantage of Great Britain, and this province, is to establish a Paper Currency, or bills of credit, upon a sinking fund."

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all contracts for current money made after the publication of the act; for lawyers' fees, if paid immediately after the conclusion of the case; for all levies, except those for the ministers' salaries and for building churches; and for all customs duties, except those payable to the proprietor or crown and those levied by the act itself. Such of these payments as were levied in tobacco were to be discharged in paper money at ten shillings per hundred pounds, and such as were levied in money were to be discharged at the rate of £133⅓ paper bills for £100 sterling.

Two provisions of the act were somewhat foreign to its general nature. Three thousand pounds in bills was appropriated for the erection of a mansion for the governor, and £6500 was appropriated for the erection and repair of gaols and other public buildings. The second irrelevant provision was that for every taxable engaged in the production of tobacco one hundred and fifty pounds of the worst tobacco should be burned each year.[15]

The history of the paper-money issue falls into two clearly distinguished periods: from 1734 to the first redemption in 1748–1749, and from 1749 to the final redemption in 1764–1765. The act was put into execution at once. The London agents had a paper manufactured under their personal supervision, and the bills were struck from engraved copper plates.[16] During the winter of 1733–1734 everything was prepared, and in the June courts, 1734, the thirty shillings per taxable was distributed.[17] A report to the assembly of the following April shows that £47,923½ was sent to the counties for distribution.[18] Several faults may be found

[15] Acts of 1733; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 5: 1269), T 23; Bacon, 1733, ch. 6.

[16] Account of London agents, Scharf Papers, box 17 (Maryland Historical Society).

[17] Dorchester County, Court Records, June, 1734, p. 411; Baltimore County, Court Records, November, 1733, Liber JWS No. 9, p. 131; Proprietary Papers, vol. iv, nos. 26, 27, 28, Maryland Historical Society.

[18] Not all of this was distributed. In 1736 the auditing committee complained that "although a greater sum of money has been transmitted to the justices of the several counties than was demanded from them by the inhabitants for the taxables in the said counties,

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with this method of distribution. It imposed upon the future a burden of taxation the benefits of which would long since have passed away. The next generation was taxed that their fathers might enjoy thirty shillings for which they had not labored.[19] Daniel Dulany also attributed to this method of distribution much of the depreciation which the bills suffered. "The old Proverb, Lightly come, Lightly go," he wrote, "was strongly exemplifyed."[20]

During the course of the first ten months £7374 was lent on security. About £1500 was spent in sundry ways, making a total of about £56,000 that went into circulation during the first year after the opening of the office. The normal way, according to the act, for the remaining £34,000 to get into circulation was by means of loans and administrative expenses. Until March 22, 1736/7, however, only £16,160 had been lent out, and £3054 had been paid back on interest and principal. With all other receipts and expenditures considered, there still remained £20,131 to be put into circulation.[21]

Partly in order to get this balance into circulation, and partly to ease the burden of immediate payment of appropriations, there followed a series of acts calling upon the commissioners of paper currency to pay the expenses of government. By the paper money act itself £9500 had been appropriated for erection and repair of public buildings. By acts of 1735, 1736, and 1737 the public expenses of these years were discharged out of the paper money.[22] By these

yet there has not been any money returned by the said justices" (Upper House Journal, April 6, 1736). Some £309 was returned before 1748, but in that year a letter was sent to all delinquents (Lower House Journal, June 11, 1748; Maryland Historical Society, Red Book No. 2, 17). As late as 1758 the clerk was ordered to write to the justices of Cecil County for an accounting (Lower House Journal, May 6, 1758).

[19] Essay Concerning Silver and Paper Currencies, in Prince Society Reprints, vol. iii, p. 228.

[20] Calvert Papers, No. 2, p. 245.

[21] Upper House Journal, May 26, 1737.

[22] Bacon, 1735, ch. 24; 1737, ch. 18; Acts of 1735, p. 24. The purposes of the assembly in these acts are stated to be, first, prompt payment of the public debts, and, second, a greater diffusion of the bills (Lower House Journal, May 23, 1737).

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three acts £9403 was put in circulation. The expeditions against the West Indies in 1740 and against Canada in 1746 gave an opportunity for the assembly to float still more bills; and at the same time, the existence of the paper money enabled the province to meet these contingencies without undue effort. Altogether, the circulation of bills was increased about £12,000 by appropriations for the two expeditions.[23] By means of these public loans to the province the balance of paper money remaining in the office was reduced from £20,131 in March, 1736, to £11,464 in April, 1740, and to £2851 in April, 1747.[24]

Scarcely had the paper money entered circulation when it began to depreciate rapidly in value. The inventories show that by 1739 exchange had risen as high as £200 paper to £133⅓ gold and silver, or £100 sterling. This rate became generally accepted, and until about 1750 almost all estates are inventoried in money at this value. Commercially, there was a little greater fluctuation. At times £250 paper was asked for £100 sterling.[25] A complaint is heard in Baltimore County in 1742 of £300 being demanded.[26] Henry Callister's report of current exchange to his principals in London shows that in 1746 and 1747 exchange varied be-

[23] Bacon, 1746, chs. 1, 10; 1740, ch. 2; Acts of 1740 (First Session), p. 1; Acts of 1740 (Second Session), p. 1.

[24] Throughout this chapter unnoted figures are drawn from the reports of the auditing committees of the assembly. These reports are to be found in the journals on the following dates: April 19, 1735; April 6, 1736; May 26, 1737; June 9, 1739; May 12, 1740; June 13, 1741; October 26, 1742; May 29, 1744; September 26, 1745; July 11, 1747; June 8, 1748; May 28, 1750; June 7, 1751; November 12, 1753; May 20, 1754; March 10, 1755; March 5, October 8, 1756; April 28, 1757; May 8, 1758; April 21, 1761; April 24, 1762; October 14, November 24, 1763; July 17, 1764; November 29, 1765.

[25] Douglass, A Discourse Concerning the Currencies of the British Plantations in America, p. 17; Douglass, A Summary, Historical and Political, of the First Planting . . . of the British Settlements in North-America, vol. ii, p. 365.

[26] "Of 5/ currency and £5:1:5 sterl. for goods due from the deceased to James Rigbie as per his acct. proved, and paid by this accountant Margaret as per receipt aᵇ which sterling sum this accountant discharged in currency @ 300% exchange and although she endeavoured to her utmost to pay in an easier Manner, she could not do it as per this accountant's oath . . . £15:9:4" (Administration Accounts, Liber C No. 3, p. 295).

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tween £200 and £230 paper for £100 sterling.[27] It may be concluded, therefore, that during the first twelve or fifteen years of its circulation paper money passed at a little above £200 paper for £100 sterling,—a depreciation of 33⅓ per cent of its face value.[28]

A contemporary writer on currency mentions and explains this depreciation as follows: "They [Marylanders] then [1734] emitted 90000 l. in Bills, which tho' payable to the Possessors in Sterling well secured, the Sum being too large, and the Periods too long, viz. three partial payments of 15 Years Periods each;[29] *Exchange immediately rose from 33 to 100 and 150 per Cent.*"[30] It is always difficult to determine just how much currency a country should have, but from the best indications £90,000 does not seem to have been very excessive, and the £70,000 or £80,000 in circulation toward the end of the period does not seem to have been excessive at all. Exchange fluctuations show that some coin was displaced at the first issue of paper. Even before the paper had reached circulation, bills of exchange rose so rapidly that it was feared that the proprietor's income would have to be transmitted in bullion instead of bills.[31] Yet evidences are very strong that in general during the years of the paper currency, coin was increasing rather than diminishing in the province.[32] So far was the colony from

[27] The ledger of Robert Morris, now among the court records of Dorchester County, shows one hundred per cent exchange between sterling and paper.

[28] In March, 1735, the innkeepers of Prince George's County declared "that the paper Money (the only currency at this Time) is so Sunk in its Value of late and wines & other Liquors so Much advanced in their Prices that Your Pet^rs Cannot Carry on their Business according to the Present Rates as last Assest by this Worshipful Court without Suffering very great Loss thereby" (Court Record, Liber W, p. 41). At the August court a slight advance was made in six of the wine rates (ibid., p. 158).

[29] This is a mistake. There were two periods, one of fifteen and one of sixteen years.

[30] Douglass, A Discourse Concerning the Currencies of the British Plantations in America, p. 17.

[31] Calvert Papers, MS., No. 295½, p. 66.

[32] See page 20.

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being stripped of its coin that Marylanders traveling in New England spoke of the scarcity of coin in those colonies.[83]

Another strong indication that excessive issue was not the only cause of depreciation is the fact that when in 1756 about £34,000 additional was issued, the exchange between paper and sterling does not seem to have been seriously affected. Moreover, there could have been no excess of paper in circulation about 1760, for at that time all sources agree that paper had almost completely disappeared. The best conclusion, perhaps, is that at first there was general lack of confidence in the security of the paper. So many colonies had issued paper with disastrous results that people could not believe that this issue would be exceptional. This feeling, taken in conjunction with a slight overissue, accounts for the initial depreciation. In the later years, however, after the currency had been somewhat diminished and the business needs of the colony had somewhat increased, there was no excess whatever in the issue. Moreover, the first redemption of one third of the bills and the flourishing state of the funds in London gave proof of perfect security. Although under these conditions one would expect the money to pass at par, yet the habit of discounting the value of paper was so fixed in the public mind that bills still passed current for less than their intrinsic worth.[84]

A reason assigned at the time for the depreciation of the currency, and one which very likely did affect its value, was that paper money was not legal tender for officers' fees or parish levies. We have already noticed that in drawing the bill of 1733 the Lower House deliberately refused, probably because of a disagreement as to rates, to make the notes payable for officers' and ministers' fees. Just enough of the public dues were thus left not payable in paper to

[83] Dr. Alexander Hamilton of Annapolis, writing in Rhode Island, said, "This is the only part ever I knew where gold and silver coin is not commonly current" (Hamilton's Itinerarium, p. 180). It is not clear whether he refers to Rhode Island alone or to all New England.

[84] This condition made possible the speculations of which there was so much complaint.

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hinder its usefulness to some extent and to cast a shadow of suspicion over it in general.

The struggle of the session of 1733 on this subject was continued into the succeeding years. Excessive fees for officers and clergymen formed one of the most serious grievances of the colony, and every possible opportunity was seized by the Lower House to fight the question out. The change from a tobacco to a money basis offered an excellent opportunity to make the fees payable in either tobacco or paper, that the people might always have the advantage of paying in the cheaper commodity. The Upper House, however, represented the fee-receiving classes, and was the stronghold of privilege. It firmly refused to accept any bill that did not make the fees payable in one medium only, or any bill that tended under any pretext to reduce the fees.

Many bills were lost because of this disagreement between the two houses of assembly. In 1736 the Upper House professed itself willing to do anything to maintain the credit of the bills, but refused to accept a Lower House bill making officers' fees payable in paper. A conference committee on the subject avoided the point at issue, and reported back a novel scheme to enable the people to pay quit-rents in paper. When the Lower House further suggested that all levies be made payable in either paper or tobacco, the Upper House again refused to agree to an alternative payment; and the Lower House, fearing that "the people will be under great Difficulties if they are obliged to pay their Levies in money only," let the plan drop.[85] In 1737, probably because of the hopelessness of the situation, the Lower House refused to consider a bill for altering the method of payment of the officers' and ministers' fees.[86] In 1739 the governor in his opening address to the assembly recommended that these fees be made payable in paper at ten shillings per hundred pounds of tobacco, but even he, the leader of the government

[85] Upper House Journal, March 31, April 3, 1736; Lower House Journal, April 5, 7, 8, 22, 1736.
[86] Lower House Journal, May 6, 1737.

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party, could not say how the clergy would look upon such a change.[87]

In making a reply, both houses avoided the general question, but suggested that some special action be taken to relieve the settlers on the frontier, who raised no tobacco, by making their dues payable in paper. The Lower House also complained bitterly of the amount of the fees, and wished that it "had not good Reason to be assured that the little Credit given by his Lordship's Officers to a Currency struck by his Lordship and the People here, on the best Security, has not been the Means in a great manner to depreciate the same." Nevertheless, it reiterated its intention not to yield in the matter, but rather "to let it take it's Chance on the Foundation whereon it now stands, which we are well assured must give it a due Credit in Time."[88] There were a few recriminations on both sides, but nothing further was done in the matter. So complete was the deadlock that after five or six years of fruitless debate the question was tacitly dropped, and the paper currency was left to maintain what credit it could in its partly efficient state.

It was not until the passage of the tobacco act of 1747 that the question of making fees and parish levies payable in paper was again taken up. By that act officers' fees in general were reduced when paid in inspected tobacco, and were also made payable in money at twelve shillings six

[87] Lower House Journal, May 1, 1739.

[88] Lower House Journal, Upper House Journal, May 4, 1739. The governor in answer to this address said: "I am obliged to you for acknowleging that you have good Reason to be assured, that the little Credit given by his Lordship's Officers to our Currency, *has not been the Means in a great manner to depreciate the same*, this is but doing them Justice; Our Paper Money not paying the Clergy and Officers, being the chief, if not only Reason of the present low State of it's Credit: But however that may be, I cannot but be concerned to find anything weigh with the Representatives of the good People of *Maryland*, to let it take its Chance on the Foundation whereon it now stands, especially as you seem to acknowledge, that it is of the utmost Importance to this Province to Circulate and give a Credit to our Currency . . .: What Evils you apprehend in raising the Value of our Paper Money, I must own I cannot imagine; but should be glad that they were to be fairly examined, being perswaded, that if your Apprehensions should be found to be ill grounded, you would readily quiet them for the Good of the Province" (Lower House Journal, May 10, 1739).

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pence per hundred pounds. The forty pounds of tobacco per poll for the clergy was also reduced to thirty when paid in tobacco, but along with special assessments for the building of churches it was made payable in money for those who took oath that they produced no tobacco. This added greatly to the usefulness of paper, and for the first time made it possible for bills to accomplish one of the chief purposes for which they had been issued by completely relieving the inhabitants of the necessity of producing tobacco.

Another difficulty in this connection arose with the sheriffs. Since, by the paper-money act, county and provincial levies were payable in either tobacco or paper, it followed that the sheriffs received both currencies in their collections, and they were thus able, by paying an undue proportion of accounts in the cheaper medium, to hold back as illegal profit for themselves the excess of value they had received in the better currency. Furthermore, they often resorted to various schemes to prevent the payment of levies in money when tobacco happened to be the more valuable.[39] In 1735 the assembly sought to remedy this abuse by changing the terms in which all levies and public payments were made from the time-honored tobacco to a money basis.[40] This, however, proved to be merely a change of names, for the real difficulty continued to exist. In 1736 another act was passed against the practice, but it was not until 1742 that a satisfactory law was devised. By this statute sheriffs were required to make out sworn statements of the amount of money and tobacco received from each taxable; these statements were to be conspicuously posted at the courthouses, and each payment made by a sheriff must be in the same proportions of money and tobacco that the statement showed that sheriff to have collected. This act seems effectively to have remedied the difficulty, for it was continued from time to time as long as the paper money was in circulation.[41]

[39] Lower House Journal, April 2, 5, 7, 1736.
[40] Acts of 1735, p. 2.
[41] Bacon, 1742, ch. 7.

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Whatever may have been the cause of the depreciation of the paper currency,—excessive issue, lack of confidence, or contempt on the part of the officials,—the management and growth of the sinking fund for redemption were only such as would furnish the greatest security. In accordance with the paper-money act a central office was established in Annapolis with a secretary and three commissioners. At almost every session of the assembly during the first fifteen years an auditing committee was appointed to go over the books of the commission and to make certain that its affairs were in proper order. The act of 1733 required that loans be made only on the best security, and as far as can be told from the reports of the several auditing committees not a shilling was lost on loans throughout this period. The amount of money lent out at interest during the first eleven months was £7374, but the loans gradually diminished to about £1500 per year after 1740. The total amount of borrowed money in circulation reached £19,727 in 1739, gradually dropping to between £16,000 and £17,000. Down to 1748 the interest paid on loans aggregated £5663.

To take charge of the paper-money affairs in London the act of 1733 designated three English merchants, Hyde, Hunt, and Cruickshank, who had wide business relations in Maryland. About 1745 Hyde and Cruickshank both failed, and Lord Baltimore, by virtue of the power vested in him by the act, appointed as their successors Hanbury and Adams, two other London merchants in the Maryland trade.[42] These men seem to have performed faithfully the duties of receiving the money transmitted to them from Maryland and investing it in stock of the Bank of England, in which form it was held as a sinking fund for the paper. From time to time statements were sent to the Annapolis commissioners and the assembly. On one occasion only does there appear any doubt as to the accuracy of these statements and their agree-

[42] Upper House Journal, July 2, 1746; Calvert Papers, MS., No. 1136.

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ment with the accounts of the commissioners and the naval officers.[43]

The money transmitted to the London trustees was raised principally by the duty of fifteen pence sterling per hogshead on all tobacco exported. With the tobacco crop amounting to nearly thirty thousand hogsheads per year, this tax alone would have been sufficient to sink the bills at the appointed times; but when the province began borrowing so largely from the paper-money office to meet the expenses of government, it became necessary to provide other funds to repay these loans. Several loans, such as that for the erection and repair of public buildings, which is in the act of 1733, and an act for the relief of Charles Sewell,[44] had no provision for their repayment. The acts of 1735, 1736, and 1737, which provided that part of the current expenses of those years should be paid in paper, declared that the regular levies should be collected by the sheriffs and paid over to the paper-money commissioners.[45] So, also, the appropriation of 1740 for the encouragement of enlistments was to be repaid from the public levies of 1741 and 1742.[46] The act for the transportation of troops to the West Indies in 1740 showed a new principle in that it abandoned the custom of laying special assessments in the general levy and appropriated specific taxes and duties for the repayment of the loan. For this purpose the assembly set aside one half of the import duties on liquors, negroes, and Irish servants, which had previously been used to help to pay the running expenses of the colony, and levied a new license tax on ordinaries, or public houses, amounting to £5 for those in Annapolis and fifty shillings for those in the counties.[47] The latter tax proved so productive that in 1746 import duties were abandoned, and the license tax on ordinaries

[43] Upper House Journal, June 4, 1744.
[44] Bacon, 1741, ch. 12.
[45] Ibid., 1735, ch. 24; 1737, ch. 18; Acts of 1735, p. 24; and reports of the auditing committees.
[46] Acts of 1740 (April session), p. 1.
[47] Acts of 1740 (July session), p. 1.

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was continued to pay back the new loans for the Canadian expedition.[48]

These provisions were rarely sufficient to repay all the money borrowed. The loans in the years 1735, 1736, and 1737 to pay current expenses showed a deficit of £3388 after the public levies had been turned in to the commissioners. The money paid for bounties to encourage enlistments in the Cuban expedition of 1740 was not repaid by £686. The appropriation for the transportation of troops in that campaign, however, was overpaid by £1010, which was turned over to the Canadian expedition of 1746. The productive license tax on ordinaries was in 1749 still being paid toward the loan for the latter expedition.[49] Altogether, omitting all account of the Canadian expedition loan, which was still in process of repayment, the paper money had by 1749 contributed more than £15,000 currency toward the expenses of the colony.[50]

Notwithstanding these unprofitable dealings with the government, the revenues provided for sinking the paper money were more than sufficient to bear the burden. Between 1734 and 1749 there were sent to the London agents bills of exchange for £28,907 sterling. This money was invested in bank-stock at premiums varying from 119 to 149¼. The semiannual dividends on stock amounted to £7697 sterling. The total amount of the fund on January 1, 1749, was £190. 17s. sterling in cash and £24,000 in bank-stock, which had cost £32,977. 10s. sterling,[51] a total currency value of £44,223.[52] Moreover, there was due the currency commission at this time £17,182 currency from well-secured private loans. This makes a grand total of £61,405 cur-

[48] Bacon, 1746, chs. 1, 10.

[49] Lower House Journal, May 20, 1754; March 10, 1755.

[50] For public buildings and county gaols in accordance with act of 1733 ..... £11,567
To Charles Sewell for Indian lands..... 605
Balance unpaid on the various loans..... 3,064
Total £15,236

[51] Scharf Papers, box 17.

[52] One hundred pounds sterling was equal to £133⅓ currency.

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rency, which in fifteen years had become available for sinking the £90,000 currency issued. In other words, in half the time the issue was to run more than two thirds of the sinking fund had been completed. Such was the condition of the paper currency when the time arrived for retiring £30,000 of the bills.

According to the act of 1733, between September 29, 1748, and March 29, 1749, one third of the money issued was to be redeemed in sterling bills at the rate of £133⅓ paper to £100 sterling. Holders of notes were to bring them to the office in Annapolis and to receive back one third in bills and two thirds in notes of a new series. Thus, in order to have one third redeemed it was necessary to produce the other two thirds.

As the time for redemption approached, the first effect noticeable was a sharp rise in the value of paper. On August 6, 1748, Henry Callister wrote: "Paper Money has risen in value on accot. of the approaching Sale [?] of ⅓ sinking this year & Ex^a^. has fallen in 10 Weeks time from 130 to 75% our paper mony is now as good as gold Currency (for whoever wants to exch^a^. ⅓ must produce the ⅔ or the whole at the office wherefore it is hoarded up and made scarce) by next May I expect to see it down again to 150." In order to get paper to redeem at its full face value, merchants collected their currency debts as closely as possible, and cut the prices of their goods to all who would pay in paper.[53] Unfortunately, some took advantage of the opportunity to squeeze their debtors. We are told that the rise of paper was caused "by such griping Cred^rs^. as my Neighbours Mr. B——t [Bennett], who calling in bonds of such as had not the Mony to lay down, bonded them anew reducing the Paper to Gold Currency, & with some the whole Debt was so discounted with the Paper Mony almost on a foot with the Gold."[54]

During the period set the commissioners paid off and can-

[53] Several letters from Richard Bennett to his factor appear in Chancery Record, Liber DD No. 1, pp. 209, 210.
[54] Callister MSS., August 1, 1748.

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celed £27,987. 12s. of the paper. This amount was paid by bills on the London agents to be met by sales of bank-stock. Unfortunately for the province, just at the time when this stock had to be marketed its value was at almost its lowest point. Though much had been bought as high as £1450 per £1000, the first sold brought only £1270. During the course of the year, however, the price gradually rose, and the last shares sold for more than £1350 per £1000. The average cost had been £1374 per £1000, and the average proceeds of the £12,000 sold was £1310. By this mishap the province lost £767 sterling.[55]

The redemption of 1748–1749 brought to a close the first period of the paper-currency issue. The second period, 1749–1764, was in many respects different from the first. The tobacco act of 1747 went into effect at almost the same time that the redemption occurred; this meant that just as the amount of bills in circulation was diminished one third, their usefulness was somewhat increased. Moreover, the growing population and trade of the province were constantly increasing the demand for a circulating medium. Confidence in the backing of the notes, also, was strengthened by the prompt cancelation of the first instalment. Thus, many reasons converged to increase the demand for paper currency and to raise its credit.

The new situation was reflected in the exchange value of paper. Previous to the period of redemption the exchange between paper and sterling had been about two to one. During the months while the redemption was in progress exchange had fallen to one and a third to one, or par value (£133⅓ currency equalled £100 sterling). Immediately after the abnormal conditions had ceased, exchange again declined. Habit, and ignorance of the real value of paper money seem to have carried it below a normal figure, but it soon began a gradual and steady rise.[56] For several years

[55] Scharf Papers, box 17.

[56] In 1750 a rate of £180 paper to £100 sterling is found (Baltimore County, Administrative Accounts, Liber C 3, p. 299; Callister MSS., July 9, 1751). See quotation on page 99.

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persons seemed unable to adjust themselves to the new value of paper. Henry Callister wrote on July 9, 1751, as follows: "Our Currency (thô its' value be raised in Ex^a. with those who are sensible of its' worth) is not so much in Esteem with the less discerning, or greatest part of us, as the Sterling seems to be debased or depreciated by the Exchange & by the prodigious quantitys of Goods in the Country—for example The Planter seems to think no more of 25/ now than he did 7 or 8 years agoe & yet there's 60 pct. odds in the Exchange."[57] In 1752 exchange ranged from £155 to £160 paper to £100 sterling.[58] In June of that year the court of Frederick County, Virginia, "Ordered that maryland money be rated at the same value as pennsylvania money."[59]

By 1753 the exchange was down to £150 paper to £100 sterling, a depreciation of about eleven per cent of its nominal value. It fluctuated about this point for nearly a decade.[60] A Maryland writer, probably Governor Sharpe, wrote in 1764: "In the year 1749 the Difference between Maryland Currency and Bills of Exchange in London was at Eighty pcentum and it continued to lessen untill the End of the Year 1753 when Exchange was at £155 Currency for £100 Sterling, during the late War the Exchange was very fluctuating sometimes so high as Seventy pcentum and for sometime in 1759 so low as a hundred and Fifty for a hundred, but for these four years the Exchange here hath been gradually lowering as the time when Our Bills of Credit are

[57] Callister MSS.

[58] Ibid., April 5, August 7, 1752; Somerset County, Court Records, 1751–1752, p. 162. In the latter the term "whole gold" can mean only sterling.

[59] Court Records, Liber OB No. 4, p. 182 (Winchester, Virginia).

[60] Frederick County, Court Records, 1753, Liber H, p. 189; Chancery Record, Liber DD No. 1, p. 166; Worcester County, Inventories, 1759, p. 369. June 4, 1761, Symmer Brothers advertised in the Maryland Gazette for settlements, offering fifty per cent exchange between paper and bills; June 12, 1759, Henry Callister wrote: "Cannot you send me a bill? . . . But it will not do above 50 pct. exchange, as current here of a long time; . . . There is more art than reality in your [Pennsylvania] Exchange; ours goes on the intrinsick value of its fund more than the fluctuation of Demands" (Callister MSS.).

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to be sunk approaches so that at present it is under Forty pcent and will certainly be very Soon at Thirty Three and a Third for the Reason abovementioned."[61] As the writer was comparing the value of paper money with that of bills of exchange, it is evident that the premium on foreign exchange is here included against the paper. Moreover, the fluctuations during the French War were probably due more to the foreign exchange than to the paper. The statements, however, agree very closely with such quotations as can be found in other records.[62] In general, during the second period in the life of the paper-money issue of 1733 the value of the paper first fell to depths like those of the previous period and then gradually rose to about £150 paper to £100 sterling. There it stood until about 1760, when, after some further fluctuations, it gradually rose to its par value, £133⅓ paper to £100 sterling.

Prices were sensitive to these variations in the value of money. On September 1, 1752, the Maryland Gazette requested its subscribers to take notice "That as our Paper Currency is now of greater Value, and much scarcer, than when this Gazette was first publish'd, . . . They [the subscribers] shall not be charged, any more than *Twelve Shillings and Six Pence* a Year, instead of *Fourteen*, as it has been heretofore." Two weeks later an Annapolis carter advertised a cut in prices, adding that as he was the first to lower rates since the paper money improved, he hoped to receive preference in patronage.[63] The stores also gradually adjusted their prices. Callister wrote on July 9, 1751: "Since I came hither [Chester River] I opened sale @ 150 pct. advance Paper Mony[64] which is approved by Mr. Hanmer [at Oxford], though they have not yet begun on that

[61] MS. in Maryland Historical Society.

[62] In 1762 Ringold and Galloway, merchants, agreed to accept paper money at forty-five per cent advance over sterling (Provincial Court Record, Liber DD No. 3, p. 44). See also Land Office, Inventories, No. 83, p. 284; No. 84, pp. 83, 311.

[63] October 5, 1752.

[64] That is, goods that cost in London £100 sterling were sold in Maryland for £250 paper.

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lay yet, nor hardly any other Store. . . . At the same time this rate lays on a better advance (if you consider the Exch[a].) than 200 pct. advance did before, & yet the Planters are little sensible of this."

The additional strength of the paper money during the last fifteen years of the issue was not by any means due to good management during that period. The assembly itself grew somewhat lax in its supervision, and in 1761 was reprimanded by Governor Sharpe for its neglect.[65] The books of the commissioners became confused, and the auditing committees repeatedly advised that they be kept in the "Italian method or double entry," but no change seems to have been made.[66] In 1760 the accounts were so tangled that the committee could not understand the books during the sickness of the clerk, and had to forego an inspection.

Notwithstanding this confusion in bookkeeping, few losses seem to have occurred. In 1761 discrepancies were found between the accounts of the London agents and those of the naval officers. This led to the discovery that two naval officers, Young of Pocomoke and Darnall of Patuxent, had not made remittances to London in accordance with their accounts. Young soon secured the money and made good the defalcation, but Darnall's bond was the only security for about £900 sterling of arrears. There is nothing to show whether the money was ever secured.[67] In several instances sheriffs also were found in arrears,[68] and in 1760 the auditing committee complained that much money was due from irresponsible persons.[69] These are apparently the only cases of loss through dishonesty of officials.

In a still larger sense the management of the paper issue during the later period was inferior to that during the earlier period. The colony during these years was under severe financial strain because of the French War, and the assembly

[65] Lower House Journal, May 5, 1761.
[66] Ibid., March 1, 1756; December 14, 1757; May 8, 1758; April 4, 1760.
[67] Ibid., May 2, 5, 1761; Archives, vol. ix, p. 511.
[68] Lower House Journal, March 5, 1756; December 14, 1757.
[69] Ibid., April 3, 1760.

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freely risked the credit of the bills in order to meet its obligations. At the time of the first redemption the colony owed the loan-office nearly £4000 currency that had been borrowed for the Canadian expedition of 1746. There had also been appropriated by the tobacco inspection act an indefinite sum for the erection of warehouses and other inspection expenses. The loan-office was to be repaid out of the inspection fees. Over £4000 was certainly drawn in accordance with this act, but a gap in the accounts makes it impossible to know whether this is all that was withdrawn and what portion was repaid. Slight balances, also, were carried over from other loans to the colony, so that in 1754 there was a total indebtedness of £10,513 due from the government to the loan-office.[70]

In 1754 the French War began, and the colony was called upon to make great exertions in defense. In that year £6000 currency was appropriated for His Majesty's service out of the uncirculated bills in the loan-office.[71] Adequate provision was made for repayment. Duties were levied upon all servants (Germans excepted) and slaves and upon Madeira wine imported. A wheel tax was laid on all coaches, chairs, and chaises, and a license was required of all peddlers. The license for ordinaries, which was already appropriated for the repayment of the loan for the Canadian expedition, was raised twenty shillings, and continued after the former loan was repaid. These revenues proving reasonably productive, by 1760 the fund should have been completed, but much money was in the hands of the sheriffs and uncollectable. The taxes were continued another year, and the loan seems to have been entirely repaid about the beginning of 1761.[72]

Paper money proved such an easy financial expedient in 1754 that when still greater sums were demanded the assembly naturally resorted to the same device. In 1755 the Lower House, presuming that the £4015 which had not been

[70] Lower House Journal, May 20, 1754.
[71] Bacon, 1754, ch. 9.
[72] Lower House Journal, April 3, 1760.

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presented for redemption in 1747 and 1748 was lost and would never be presented, wished to reissue that amount as part of a £7000 appropriation. The governor, however, feared for the credit of the paper, and refused to permit the bill to pass.[73] The year 1756 opened with a serious state of affairs in the Indian War and with the frontiers almost defenseless. Something had to be done at once. Without waiting to frame a formal bill, two ordinances were passed empowering the governor to draw from the paper office £750 for immediate use.[74] No provision was made for repayment. The assembly then proceeded in a more leisurely way to enact a law providing £40,000 for military uses.

Of this large sum £5984 was borrowed from the loan-office and £34,015 was raised by a new issue of paper money[75] To make returns to the loan-office and to retire the new notes a series of taxes was laid. Duties on foreign liquors were increased and excises were laid on those of domestic production. Those importing horses, naval stores, and negroes had to pay duties on them. Taxes were also laid on bachelors, billiard-tables, land,[76] and a long series of legal documents. These revenues, it was thought, would make up the full sum in five years, but for certainty a commission was appointed to meet in August, 1760, to go over the accounts, and, if a deficiency was found, to calculate what land-tax would make up the deficiency, and to authorize the sheriffs to collect the necessary tax.[77]

Scarcely a single one of these revenue schemes proved as

[73] Archives, vol. vi, pp. 158, 162.

[74] Lower House Journal, March 6, April 1, 1756.

[75] Only £30,000 of new money was actually printed; £4015. 6s. in notes was in the paper office signed but not circulated, and this made up the balance. It is not clear just what fund this could have been. When turned over to the commissioners for the new issue, it was not charged on the books, nor was it ever returned. The amount corresponds exactly to the amount that was not presented for payment in 1748–1749. This suggests that it was probably the money prepared for delivery in 1748 which was never called for.

[76] Land belonging to Papists was taxed two shillings per hundred acres; all other land, including the proprietary manors, paid but one shilling per hundred acres.

[77] Bacon, 1756, ch. 5.

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productive as was expected. The £5984 of borrowed money was not repaid to the paper-money office until after 1758; and when the commissioners met in 1760, they found a deficiency of over £14,000, making necessary an assessment of seven shillings seven pence per hundred acres on all land, including the proprietary manors.[78] Though this was an unreasonable tax, the commissioners had no choice but to order its collection.[79] Great alarm prevailed among landholders until the assembly relieved the situation by authorizing that the taxes laid by the act of 1756 be increased and continued, and requiring the commissioners to meet again in August, 1762.[80] The duties ran until November, 1763, and when the accounts were finally settled, a balance of £5564 was carried to the credit of the original paper money.[81]

The acts of 1754 and 1756 were by far the most important cases in which the government shifted its burdens to the paper money, but there were also several minor instances of the same character. In 1756 and 1762 acts were passed appropriating a total of £700 to pay Jonas Green of Annapolis for public printing.[82] In 1757 over £200 was ordered to be paid on small bills to various persons.[83] In all of these cases the paper money was called on merely to make immediate payment, and repayment was to be made from the general levy. It is doubtful whether much of this money was ever repaid. Out of a total of nearly £1000, accounts now available show the return of only about £173.

Though such heavy demands on the paper-money office, and especially the issue of £34,000 of new bills in 1756, were highly dangerous to the credit of the paper, it is hard to see how the colony could have been financed during this trying period in any other way. The exploitation of the public credit by means of bonds was unknown to the colonies; and even if it had been known, because of the scarcity of specie

[78] Roman Catholics, of course, paid double.
[79] Lower House Journal, October 4, 1760; Archives, vol. ix, p. 453.
[80] Bacon, 1760, ch. 9.
[81] Lower House Journal, November 29, 1765.
[82] Acts of 1756; Bacon, 1762, ch. 24.
[83] Acts of 1757, p. 12.

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it would have been difficult in Maryland. The paper money, on the other hand, enabled the colony to meet its obligations when crises presented themselves, and still spread the burden over a considerable period of years. Moreover, the loss suffered by paying out about £150 currency for £100 sterling and redeeming at £133⅓ currency for £100 sterling constituted a lighter interest rate than the colony could possibly have obtained on a straight loan. Strange to say, all this tampering with the paper money seems to have had very little, if any, effect on exchange. As has been shown, the exchange stood at about £150 paper to £100 sterling throughout most of this period. Though there were some fluctuations about 1760, when the French War was at its height, yet there was no sharp rise in exchange in 1757 and 1758 such as one would expect to follow the injection of £30,000 of paper into the circulation.

The value of paper currency was undoubtedly maintained by the exceptional strength of the funds against which it was issued. Notwithstanding the heavy demands that had been made by the government, when the time came for redemption the funds were sufficient. During the French War, stock of the Bank of England declined very sharply, and it was thought that it would ultimately fall to 112 or lower. Consequently, between 1755 and 1759 the trustees purchased no stock whatever, but allowed the cash to accumulate on deposit. The Lower House estimated that the loss of dividends more than counterbalanced the gain in purchase price. The loss to the province, however, by this mistake in judgment was very slight.[84] In 1761 the fund amounted to £27,500 in bank-stock, worth at the time £36,245 sterling, and about £500 in cash. In 1763 it was enacted that money collected after December 1, 1763, should not be sent to London for investment, but be turned over at once to the commissioners at Annapolis.[85] On June 7, 1764, the colony was in possession of £40,800 of stock, worth at the time

[84] Lower House Journal, May 8, 1758; April 21, 1761.
[85] Bacon, 1763, ch. 22.

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£50,731 sterling. About the same time there was in the office £9184 currency of gold and silver, which had accumulated through payments of principal and interest of loans and in accordance with the act of 1763. Against this total of about £76,000 currency there was then in existence £62,012 in paper money, £20,716 of which was in possession of the commissioners ready to be burned.[86] Thus there existed to the credit of the colony after all paper was redeemed a surplus of nearly £36,000 currency.

Redemption of the paper money was carried out at the prescribed time in the winter of 1764–1765, but the accounts are too meagre to permit this redemption to be followed as closely as that of 1748–1749. A statement of May 30, 1766, shows several thousand pounds in bills of exchange still unpresented and the accounts, therefore, not closed.[87] As late as May 21, 1767, there was still £688 outstanding in bills of exchange and one bill under protest worth £287. At this time the colony held in bank stock £31,000, which had cost £39,179; there was also a cash balance of £1235 sterling.[88] This is, perhaps, very near the final balance of the paper-money accounts.

Few complaints of the paper currency were heard, and of these the chief one was that the wealthy made use of it for speculative purposes. By the paper-money act of 1733 most of the duties and fees due to the province, with the exception of the officers' and ministers' fees, were made payable in paper. In 1747 an option was given by which those fees also might be paid in paper instead of tobacco. These provisions were intended to give a wide field of usefulness to the paper, and they created a demand for the bills which rendered their possession almost a necessity. It therefore became possible at times for persons with a supply of paper money to demand high exchange from those who were in need of the bills to meet some public obligation payable in no other available

[86] Lower House Journal, July 17, 1764.
[87] Ibid., November 26, 1766.
[88] Ibid., May 31, 1768.

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medium.[89] To remedy this trouble, sections inserted in the tobacco act of 1754 and continued by later acts determined the value of coins when paid for these purposes, thus enabling persons to pay in coin instead of paper. This act, however, did not end the difficulty. The £40,000 act of 1756 laid new duties payable only in paper money. When in 1760 it appeared that a heavy assessment was to be laid on land in accordance with this act, the money speculators expected a strong demand for paper, and dropped exchange from £150 to £140 paper for £100 sterling.[90] In 1762 these duties also were made payable in gold and silver.[91]

As the time for redemption of the paper approached, it was very evident that exchange must advance, and paper became a profitable speculation. Those who, in that time of no banking facilities, hoarded up their savings found that paper money paid a fair interest while lying idle, and consequently paper began to disappear from circulation to lie in the tills of the speculators.[92] As early as possibly 1761 or 1762 Henry Callister wrote: "I said Currency; which does not imply Maryland money, of which there is hardly any current."[93] In 1763 the Upper House, speaking of an alternative of paper payments in a bill under consideration, said: "at this time it can be of no possible Benefit to the People, because no one, of the very few who possess Paper Money, can be imagined to be so regardless of his Interest as to part with it at a great and certain Loss"[94] (that is to say, loss

[89] "Every Person that did not make Tob° (which numbers do not) was obliged to pay his Levies or Debts of a publick nature in paper Currency, which many being oftentimes not Masters of (as there is not £60000 issued & most of that in the hands of the wealthy) they were obliged to pay their Gold and Silver at any Rate their Creditors would please to affix or on such Occasions be obliged to recur to any Person that would advance paper Cash which the Possessors would not often do but on hard Terms" (Archives, vol. vi, p. 85). See also Lower House Journal, September 26, October 4, 9, 1760.

[90] Archives, vol. ix, p. 453.

[91] Bacon, 1762, ch. 33.

[92] Lower House Journal, October 4, 1760.

[93] Daniel Clark of Philadelphia wrote to his agents in 1760 to have Maryland money saved for him should any be received (Clark Letter-book).

[94] Lower House Journal, November 3, 1763.

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of the advance in the value of paper). Secretary Calvert was much incensed at the money speculators, and as usual showed his feeling by rather strong expressions. "If I am right," he wrote in 1764, "the present Loan to be paid is £6000 [£60,000] Sterl[g] to whom, but to almost infamous Jobbers,—little currency has had circulation, the utility prevented, Lock'd up in the hands of merciless wretches that grind the very Poor."[95]

Partly because of complaints against speculators, but more especially because of complaints coming from British merchants, Parliament early began to concern itself with the issues of colonial money. In some of the colonies paper had been made legal tender for sterling debts, and British merchants had lost heavily by having accounts then standing paid in depreciated currency. Throughout the continuance of these issues, moreover, all business had to be transacted on a paper basis, much to the inconvenience and uncertainty of the merchant. Complaints soon reached Parliament,[96] and in 1739 an investigation was undertaken. Full accounts of all paper issues were called in from the colonies. Governor Ogle in a long letter to the Board of Trade set forth the history of the Maryland paper issue, and made clear the point that sterling debts were not affected by the new currency.[97] The outcome of the investigation was an address by the House of Commons to the king requesting that the act of 6 Anne be more strictly observed, and that no act of a colonial legislature be approved by the governor without a clause suspending enforcement until sanctioned by the king.[98] Letters calling attention to the matter were sent to the governors of Maryland, Pennsylvania, Connecticut, and Rhode Island.[99]

[95] Archives, vol. xiv, p. 141.
[96] Board of Trade, Plantations General, vol. xii (Public Record Office, C. O. 323: 10), N 14.
[97] Board of Trade, Proprieties, vol. xv (Public Record Office, C. O. 5: 1270), T 35; T 53.
[98] Board of Trade, Proprieties, vol. xv (Public Record Office, C. O. 5: 1270), T 40.
[99] Board of Trade Journal, vol. xlix (Public Record Office, C. O. 391: 43), 77; Acts of Privy Council, Col., vol. iii, § 496.

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In 1748 the question of paper money in the colonies was again taken up by Parliament. Again statements were demanded of the governors.[100] After investigation, the Board of Trade requested that Parliament provide for rigid regulation of all paper money in the colonies. In protest against this measure, Lord Baltimore declared in a petition that the legislative power in Maryland did not rest in the crown, and that some of the provisions for regulation provided in the bill were in direct violation of his rights in the province.[101] The bill failed at this time; but the investigation was continued,[102] and in 1751 an act was passed prohibiting the issue of bills of credit in New England, except in emergencies, and requiring the royal sanction to all paper-money acts of other colonies.[103] During the ensuing war, however, paper was the only possible financial medium, and the restraining clauses of this act were ineffective.

After the close of hostilities, in 1764, the Board of Trade again reverted to the topic of paper money. Although a report on the subject was submitted by Maryland,[104] the paper issue was then approaching so nearly the date for withdrawal that this colony had little immediate interest in the proceedings. At this time Parliament passed the well-known act making void after September 1, 1764, all colonial acts that rendered paper legal tender.[105] As the force of this act falls in the years subsequent to the period under discussion, it needs no treatment here. It is sufficient to note that Maryland did issue other currency but without making it legal tender. Paper money had become so much a part of the business life of the colony that it, or some substitute, was indispensable. As Dulany wrote: "Thô Acts of Parliament may prevent our emitting Bills of Credit under one Denomination, we shall have a paper Circulation under

[100] Maryland Historical Society, Proprietary Papers, vol. vii, no. 3.
[101] Calvert Papers, MS., No. 428.
[102] House of Commons Journal, vol. xxv, pp. 746, 792, 793, 806, 818, 819.
[103] 4 George II, 53.
[104] Archives, vol. xiv, pp. 141, 174.
[105] 4 George III, 34.

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another, if not under a publick Law; it may be upon the Bottom of private Security. The Old Course may be stopped, but a new Channel will be made."[106] In general, interference by the British Parliament with colonial paper currency worked little hardship in Maryland, and during the years preceding 1764 it was not felt at all.

It is almost hopeless to try to generalize as to the effects of the issue of paper on the economic life of the colony. Too many factors enter for any particular change to be assigned to any one cause. A few results only can be mentioned. The convenience of paper as an instrument of public finance has already been set forth. This was a benefit not anticipated by the advocates of the currency, but it is hard to see how the colony could have financed the French War without some such aid. Another almost incidental use of paper was the running of the loan-office. Money was lent at four per cent interest on the security of land or plate. There were no banks in the colony, and before the establishment of this office all loans were by private individuals and on whatever terms of interest, medium, and penalty bond a grasping creditor could wring from a needy borrower. Though easy credit is not always a good thing, this office seems to have been a decided benefit to the colony. A list of loans standing in 1755 contains the names of the most prominent men in the colony, including a surprising number of those engaged in mercantile affairs.[107] The borrowed funds must, therefore, have been largely used in productive investments. From the banker's point of view the success of the office was remarkable. We have no means of knowing how many foreclosures were necessary, but only one appears in the records at hand. In 1765 it was reported that principal money still out amounted to only £222.[108] Thus, losses through bad loans were almost negligible, while interest paid in amounted to thousands of pounds. Both as a business venture for the public and as a

[106] Calvert Papers, No. 2, pp. 245, 246.
[107] Upper House Journal, March 10, 1755.
[108] Lower House Journal, November 29, 1765.

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stimulus and aid to private industry the loan-office seems to have been an unqualified success.

As a means of abolishing the use of tobacco as money and thus opening the way for efficient regulation of the tobacco trade and the more extensive culture of grain, the paper currency was not an immediate success. The act of 1733 left most of the fees still payable only in tobacco, and it was not until 1747 that the inspection act made these fees payable in paper by those who did not produce tobacco. Thus, tobacco regulation, though tardy, did ultimately result from the paper currency, and where every one previously had been compelled to produce tobacco, it now became possible to devote land exclusively to grain. This was one of the chief objects sought in issuing the money.

Undoubtedly the greatest result of the issue was the economic stimulus caused by the presence of a large amount of paper currency. Just what effect this had on the amount of trade done or the methods of doing it can never be told. The framers of the law felt that the currency of the northern colonies was the chief agency enabling them to carry on their trade, and that the absence of currency in Maryland was the handicap preventing that colony from becoming equally active. Though it now seems clear that the character of the products and the location of markets were responsible for this condition, yet it must be admitted that Maryland developed very greatly in trade during the life of the paper currency. During these years came also the opening of the western section and the change in a large part of the colony from tobacco to grain culture. These events were the causes of the rise of trade, but paper money, without doubt, greatly facilitated the movement when it was once begun. The best proof of the way in which the bills had woven themselves into the commercial fabric of the colony is to be found in the necessity of another issue to fill their place after redemption. All evidence concurs in showing that in 1765 money was extremely scarce and

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difficult to obtain.[109] In this crisis, as Daniel Dulany wrote, "Some Medium of an internal Intercourse we must have, if our old one is demolish'd another will spring up in its place."[110] The legislature finally determined to issue paper bills against the bank-stock and coin accumulated by the paper-money commissioners. At first $173,733 of these notes was issued to pay the debts of the colony. Three years later $318,000 more was issued to establish another loan-office. To avoid the act of Parliament, these bills were not made legal tender, but the promise of the colony with its iron-bound backing of stock in the Bank of England was depended on to float them.[111] So great was the need of a circulating medium that the legislature was almost forced to this action.

Considering the peculiar benefits to grain and tobacco culture, the conveniences offered to trade, the exceptionally high exchange that the bills maintained throughout most of their life, and the faithful redemption of every shilling at face value, it is hardly too much to say that this was the most successful paper money issued by any of the colonies.

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[109] Callister MSS., November 10, 1765; January 22, 1766; Lower House Journal, September 23, 1765; Calvert Papers, No. 2, pp. 245–246.

[110] Calvert Papers, No. 2, pp. 245–246. The "Bottom of private Security" had already been tried for small change; witness the quotation on page 23, note 51.

[111] T. W. Griffith, Sketches of the Early History of Maryland, pp. 59, 60. This is the first official use of the dollar denomination in Maryland.

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CHAPTER VI

General Consideration of Money

In reviewing the subject of Maryland's monetary system in the time under consideration the most striking single feature is the confusion which accompanied the complications of standard. Mention has already been made of the confusion in the various values of coin. Other currencies served to increase the difficulty. If in 1760 an agreement had been made calling for the payment of "one pound" without further specification, the obligation might have been met by paying any one of no less than seven different pounds: the pound in goods at their sterling cost in England, the pound in sterling exchange, the pound sterling, the pound proclamation money, the pound running money, the pound paper, and the pound of tobacco. All these meanings of the word were in daily use, and it would require but a very slightly unusual use to include also a pound of hemp, flax, pork, or beef. The greater dissimilarities between circulating media, such as those between paper or tobacco and sterling, caused less confusion than the slighter differences, such as those between proclamation money and running money, or sterling and sterling exchange. The former, however, made accounting more burdensome. It was simple enough to transpose quickly from sterling to proclamation money, and to keep an account entirely in one or the other, but in using also tobacco and paper, each of which was somewhat uncertain in value, it became almost necessary to keep separate accounts for each medium. Ledgers show from one to four or five columns[1] for entries of different payments. Before the emission of paper money two columns, one for money and one for tobacco, are usually found. After the

[1] Baltimore County, Administration Accounts, Liber E 5, p. 225.

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emission of paper a separate column for this medium is customary. In some cases proclamation currency is separated from sterling. Rarely are these columns reduced to a single total, but balances are usually given in two, three, or four amounts, as the case may be. The unnecessary labor and the errors of bookkeeping under a system like this are easily conceived.

A feature of no little importance in the colonial monetary situation was the total lack of banking facilities. Nowhere was there any institution to set standards of exchange, interest, or coin value, to handle the business of foreign remittances, to store surplus cash, or to lend to those seeking capital for investment. Values of the various currencies, as has been shown, fluctuated violently and unevenly. Different merchants often accepted the same currency at different values. Only a few of the more common exchanges, such as the values of foreign coins, became fixed by custom; all others were matters of individual bargaining. In foreign exchange the same confusion prevailed. Each planter drew his own bills of exchange, and disposed of them himself at whatever price he and the purchaser could agree upon.

In the storing of money also the lack of banks was severely felt, every individual being under the necessity of hoarding up sufficient money to meet all his needs. This made necessary a large supply of currency, and exposed the individual to heavy losses by fire and theft. The mere preservation of money was no small burden.[2] The careful provision in the paper-money act for an iron box with three locks in which the money was to be kept is an instance of the care that had to be exercised. The fact that on at least two occasions attempts were made to break into the paper-money office shows the reality of the dangers which threatened.

Though no banks settled a discount rate, interest was determined by law. By an act of 1704[3] the legal interest rate

[2] In 1721 Samuel Young requested the assembly to dispose of public money in his hands (Lower House Journal, July 31, 1721).
[3] Bacon, ch. 69; Parks, p. 41.

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was fixed at six per cent for money and eight per cent for tobacco, wares, or merchandise. Although no specific reason is shown why there should be discrimination between the two currencies, it is possible that the greater fluctuations in the price of tobacco made the higher rate a necessary margin of safety for the creditor. From time to time efforts were made to reduce the interest rate on tobacco and, on one occasion at least, on money also;[4] but such efforts failed, and the act of 1704 remained law until the end of the period.

One topic about which there seems to be much misunderstanding is the legal-tender quality of the various Maryland moneys, especially tobacco. By many writers it is assumed or stated that tobacco was tender for all debts.[5] Nothing could be further from the truth, for Maryland had no general legal tender. Each form of currency was legal tender for contracts drawn in that medium. There seems never to have been a general act regulating tenders in commercial transactions, but the common law of contract prevailed by which contracts drawn in sterling were payable only in sterling and those drawn in tobacco were payable only in tobacco. Even efforts to fix a definite rate of exchange at which foreign coins were to be accepted in payment of sterling debts were uniformly unsuccessful,[6] and sterling debts were payable only in British coins unless the creditor agreed to accept other things. For currency debts there were for a while two legal payments,—foreign coins at values set by statute, and Maryland paper currency,—but when paper depreciated in value, discrimination was made, and contracts drawn in gold and silver currency were executed in that medium alone, to the exclusion of paper.

In public affairs, roughly speaking, all payments due to the crown or to the proprietor were payable only in sterling, and all payments due to the province or to officers were

[4] Lower House Journal, June 12, 1749; June 3, 1751; March 28, 1760.

[5] T. W. Griffith, Annals of Baltimore, p. 47; J. McSherry, History of Maryland, p. 94.

[6] Lower House Journal, April 6, 9, 1733; May 30, 1750.

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payable only in tobacco. No effort was ever made to gain the privilege of paying the crown duties in any other medium. On several occasions, as has been shown, the privilege was sought of paying the proprietor's quit-rents and other dues in paper. The only point ever gained was the granting of favorable rates of exchange at which foreign gold and silver would be accepted. The provincial and county levies were soon made payable in gold, silver, and paper. The commutation of official fees, however, brought on one of the bitterest political fights that the colony ever experienced. Not until the passage of the tobacco act of 1747 was paper money under certain restrictions made legal tender to officers from those who produced no tobacco, and in 1754 an exchange was agreed on by which coin might be offered instead of paper. The acts for the encouragement of the culture of hemp and flax and for the relief of debtors, as has been seen, made agricultural produce legal tender under some narrowly limited circumstances. In 1721 it was reported as a grievance that these acts had no clause obliging persons to accept tobacco for money or money for tobacco,[7] but no change was made in the law. Thus, with slight exceptions, there was in Maryland no legal tender except the medium named in each contract.

A question of importance in the financial situation of any country is the ease or difficulty with which capital can be obtained. In colonial Maryland the availability of capital was of less significance than it would have been in a more extensively commercial community, but there were occasions when a supply of money in the hands of the proper individuals would have led to the improvement of a plantation or the establishment of a business. It was in this respect, probably, that the absence of a bank was most severely felt. The great scarcity of money was the more unfortunate because of the lack of facilities for bringing together the borrowers and the lenders of what little money there was. Such being the case, it is important to notice the sources from which capital was to be obtained.

[7] Lower House Journal, February 27, 1721.

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To us the most interesting source of money during the years between 1734 and 1764 was the colonial loan-office. It has already been shown that in the establishment of the paper-money system the conference committee increased the amount of the issue in order to have a larger supply to be lent out on good security. Although the interest on these loans was to be only four per cent, yet the security requirements were such as to hamper the usefulness of the office. If lent on lands or tenements, twice the value of the loan was required as security; if lent on messuages, three times the value was demanded. Plate might serve as security at five shillings per ounce. Moreover, not more than £100 might be lent to one person within six months.[8] These provisions may have been very proper as a safeguard to the paper money, but they must have prevented many a worthy man from securing a satisfactory loan. Another difficulty with the loan-office was that it had no branches and did business only in Annapolis. The distribution of its money shows the result of this. Of the loans outstanding in 1755 over sixty-six per cent were held by residents of the three adjoining counties,—Anne Arundel, Baltimore, and Prince George's.[9] The amount of money, £14,876, outstanding at the time, however, shows that in spite of the difficulties the loan-office was being fairly well patronized. The list of borrowers includes many of the wealthiest men and most of the well-known merchants of the province. The conditions made this essentially a rich man's loan-office; and even while the paper money was at the zenith of its usefulness, Governor Sharpe expressed the desire that some scheme might be devised for lending small sums to the manor tenants when it seemed evident that the money would be used for improvements.[10] The loan-office justified itself by its work,

[8] Acts of 1733; Board of Trade, Proprieties, vol. xiv (Public Record Office, C. O. 5: 1269), T 23; Bacon, 1733, ch. 6.

[9] Upper House Journal, March 10, 1755. These counties contained only about twenty-five per cent of the free white men of the province (Gentleman's Magazine, vol. xxxiv, p. 261).

[10] Archives, vol. ix, p. 62.

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but it would have been difficult for a man to start in business on capital borrowed under such terms.

The second source of capital was the surplus held by wealthy individuals. Mortgages on land and bills of sale on personalty appear so frequently in the county records that little doubt is left as to the relations between the signers of many of these documents. The chances are strong that the regular method by which a poor man purchased a small plantation or set himself up as a tenant was by procuring a loan from a wealthy neighbor on whatever security the borrower might be able to furnish. Certain individuals seem to have engaged very extensively in such lending. The Dulanys and the Carrolls, for instance, had many bills of sale and mortgages recorded in both the provincial and the county records. One form of such individual loans is shown in a case from St. Mary's County. Lothian and Jordan of that county entered into a partnership with Richard Chase, an attorney of Baltimore County, and Chase purchased a stock of goods from a merchant of Annapolis. Later, on dissolving the partnership, Chase assumed the debt for the goods and took a note from Lothian and Jordan.[11] Another example is the case of George Neilson of Annapolis, brewer, who, being in need of capital, applied to William Diggs to buy malt for him. Diggs, unable to fill the order, went security for Neilson to Charles Carroll, who imported the malt from London. The matter was brought into court because Carroll, it was alleged, retained a large part of the malt and sold it to Neilson's customers.[12] Such personal loans, whether disguised as a partnership or made on a note, or secured by mortgage or bill of sale, probably constituted the greatest volume of borrowed capital in the colony.

The third source of capital was the merchant. As a class merchants seem to have engaged rather largely in loans as means of "creating an interest."[13] William Vernon, for in-

[11] Chancery Record, April 21, 1759, Liber BT No. 1, p. 197.
[12] Chancery Record, Liber JR No. 2, pp. 487–500.
[13] This condition still obtains in the tobacco sections of Maryland. On June 22, 1899, Mr. J. B. Ayer, master of the state Grange of

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stance, borrowed £100 sterling from John Hanbury, a London merchant, in order to buy a plantation. The loan was satisfied by shipments of tobacco and the execution of a mortgage on the land.[14] A more interesting example was that of John Stewart and Duncan Campbell of London, merchants, who through William Lux, their factor at Elk Ridge, lent Caleb Dorsey £263 on the security of his prospects of inheriting a fortune from his father, Basil. When Caleb died before his father, the latter agreed to pay his son's debts. Stewart and Campbell, however, demanded payment in bills of exchange; and before the bills were procured, Basil Dorsey died. The creditors were then forced into court because Basil's executors claimed that they had no authority to pay the debts of the testator's son.[15] Both merchants[16] and planters regularly overdrew on their London factors whenever occasion arose. A big London firm wrote as follows: "The Small Shippers generally draw to the full; and most of them exceed the value, some very much so."[17] Another firm wrote: "Our Concern have always been very liberal to friendly planters in lending Cash upon emergency without interest."[18] On this matter William Molleson, merchant, instructed his factor, Charles Ridgely, as follows: "my plan is to get head among the good planters who dont always want favours, yet if you should find it necessary to advance some of the more needy ones Cash upon their Bills to you for Shipping their Tobacco, you may endorse as far as three hundred pounds Sterling upon

Maryland, testified before the Industrial Commission as follows: "As far as Maryland is concerned, especially in the southern part, where they grow tobacco, which is a crop that does not bring in money frequently, they go to Baltimore and obtain supplies from the merchants there, and I presume they take a lien on the crop. They obtain their fertilizers and necessary provisions, and so on, and when they sell the Tobacco they settle with the merchants" (57th Cong., 1st sess., H. Doc. No. 179, p. 105).

[14] Chancery Record, Liber JR No. 2, p. 281.

[15] Chancery Record, Liber DD No. 1, pp. 342–348.

[16] See a letter in which Charles Ridgely requested such credit (Ridgely Papers, September 28, 1764). See also Russell to Ridgely (ibid., 1766).

[17] Ibid., March 23, 1767.

[18] Callister MSS., May 9, 1763.

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the whole and the Bills so endorsed by you shall be paid, but for God Sake be cautious of your Men."[19]

The merchant's loan often assumed the familiar form of the book credit. This form of business was very extensive, and was much complained of at the time.[20] Book credits to planters, however, though really loans, were seldom productively engaged, and can hardly be classed as an important source of capital. Similar to book credits, but far more important, was the custom among Maryland merchants of dealing on the credit of correspondents in London, Philadelphia, or some other trade center. This form of borrowing showed all gradations from the factor sent over from London to take charge of the goods of his principal to an ordinary Maryland merchant doing business on long-time credit. The same individual often began as a factor, later received consignments of goods to be sold on commission, and finally bought outright on such credit as might be necessary.[21] A large volume of trade was done on the commission system, which is clearly a form of capital borrowing.

There were drawbacks to each of these methods. The difficulties in borrowing from the provincial loan-office have already been pointed out, but this was the only place where the borrower could expect anything like just treatment. Here all could receive loans if they met the conditions, and

[19] Molleson to Ridgely, in Ridgely Papers, March 10, 1763.

[20] Henry Callister wrote as follows: "The Substantial people here complain that the large Credits ruin the Country, but by the by, they Speak feelingly for their private Interest, for these Credits keep down the price of their Crops, but it is a question with me whether the Country is not enrich'd by Credits, & whether the Merchants have not the greater cause to complain, the Tobacco bought in this manner turning out on the long run the dearest purchase" (Callister MSS.).

[21] For instance, Robert Morris and Henry Callister. A letter from James Russell, an English merchant, to Charles Ridgely, a merchant of Baltimore County, shows an effort to deal on borrowed capital. "I am very willing & ready," he writes, "to Ship you goods on the following terms viz to be paid for in twelve months from the date of the Invoice what is not remitted in that time to allow 5 P ct Interest till in cash & if any part is remitted before the 12 Months you to be allowed Interest for the time, if these terms are agreeable to you I am very ready & willing to do your business" (Ridgely Papers, March 3, 1766).

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the same conditions applied to every one. Loans from individuals were, of course, individual affairs. A private loan might be made or withheld at the whim of the lender. This plan, moreover, exposed the debtor to the utmost rigor of the bargaining power of the creditor, and complaints of the severity of the grasping creditor were filed.[22] The third method of obtaining credit was possible only to merchants or shippers. It was peculiar in that frequently no interest was paid, the creditor being remunerated by trade advantages alone. Its great disadvantage was that it often exposed a debtor merchant's business to interference from without. Nevertheless it was the method by which most credit mercantiling was transacted, and was the means by which many large enterprises were established. On the whole, though there were no regularly established banks or other institutions of credit, it was not difficult for one properly qualified with security or business ability and not afraid to risk exposure to the debtor's prison to procure capital for any productive undertaking.

During the years through which we have followed the history of Maryland's currency there were many minor improvements, but the great monetary problems remained unsolved. Among the points of advance we may note that there was more money in the province in 1765 than in 1720. On the other hand, the greater volume of business was increasing the demand for money so rapidly that the scarcity of coin was as keenly felt in the later as in the earlier period. In the use of tobacco as currency these years saw the solution of many perplexing problems, and by 1765 notes, official inspection, and other improvements had rendered tobacco a far less awkward medium than it had been in 1720.

Possibly the greatest step forward was the gradual abandonment of tobacco currency. In 1765, however, this movement had only begun, and large sections were still transacting most of their business in terms of that crop. Its decline as a standard of value was more complete and the results

[22] See pages 96, 107.

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were most important. Paper money entered the field, and although it was a dangerous financial instrument, it was successfully used by the colonists. At the same time the period closed with one problem not only unsolved, but actually more grave than before. The multiplicity and the confusion of standards were far worse at the end than at the beginning. From 1720 to 1765 was, on the whole, a time of patient experiment and slow advance, but it cannot be considered a period of brilliant financial achievement.

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CHAPTER VII

Transportation and Communication

As economic factors money and transportation are very closely akin. Just as money facilitates the bargaining for exchange of goods when people are met together, so roads and post-offices facilitate the meeting of individuals and the moving of the goods bargained for. Both money and roads are lubricants in the machinery of trade. It is proper, therefore, that all agencies of transportation and communication should be considered side by side with a study of money.

The system of road administration in Maryland was laid down by an act of 1704,[1] in which control of the roads was vested entirely in the counties. Every year the county court enumerated in its records what routes were to be considered public roads, and appointed overseers for their superintendence. With the exception of the county justices, these overseers were the only road officials. As many as fifty or sixty[2] were sometimes appointed for a single county, and the roads in the care of each were exactly specified. The duties of the overseers were to assume complete control over the maintenance of highways in their sections and to open any new roads that the county court might order. They were empowered to summon every taxable man of their districts[3] to work upon any part of the road that they might direct. A fine of one hundred pounds of tobacco was provided for every laborer or his master who failed to

[1] Bacon, ch. 21; Parks, p. 26.

[2] Just before Prince George's County was divided sixty-three road overseers were appointed (Court Records, November, 1746, Liber F F, p. 184).

[3] Owners of iron works were required after 1750 to send only one tenth of their laborers to work on the roads (Bacon, 1750, ch. 14).

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obey this summons.[4] The overseer's office paid no salary, but was compulsory under a fine of five hundred pounds of tobacco for neglect of duty.[5] The office was naturally not popular. It involved a great deal of work and the necessity of requiring one's neighbors to perform an unpleasant task. At times overseer and laborers were compelled to work as far as twenty miles from their homes and on roads that they never used.[6] Men of the lower class were usually appointed overseers, and petitions to be relieved of the office were occasionally received.[7]

The overseers had no authority to extend or change the roads, as this duty was vested only in the county court.[8] The regular procedure was for the inhabitants of a region to petition the county for any desired changes or extensions; the court then appointed a commission to view the location and report to the next court; and on receipt of this report the court either rejected the petition or ordered the overseer to make the desired changes. Often when the road was to be made at the request of a single individual the expenses were borne by the petitioner. Frequently, however, people cleared roads for their own private use without reference to the courts, and these private ways constituted a large proportion of the total mileage. Some of them

[4] By the act of 1704 this fine was laid by the county court on prosecution being brought by the overseer. This was found burdensome, and in 1723 the fine was made recoverable before a single justice of the peace (Bacon, 1723, ch. 17).

[5] For some prosecutions see Frederick County, Court Records, August, 1752, Liber G, p. 259.

[6] Frederick County, Court Records, June, 1750, Liber A, p. 552; Dorchester County, Court Records, August, 1733, p. 99. A Prince George's overseer complained of an unfair division of roads between the overseers (Court Records, March, 1730/1, Liber R, p. 16).

[7] Governor Hart said to the assembly in 1719 that the disregard of the road laws "proceeds from the want of a sufficient penalty on the overseers and on those that refuse to pay obedience to their orders & that Generally the meanest of the people are appointed to those offices which obliges me to repeat what I said on another Occasion no man is too good to serve his Country" (Lower House Journal, May 14, 1719).

[8] The governor and the council were empowered by law to order the change of a public road, but I know of no instance in which they ever did so.

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seem to have served large communities and in every respect except legally to have been public roads.[9] In many instances they were probably as well maintained as the public highways; in other cases they were mere bridle-paths. In fact, some of them were occasionally spoken of as paths.[10] A Cecil County petition, for instance, spoke of a ferry that was much used over the Susquehanna, and complained that there was "no direct road leading that way, but small paths very difficult to strangers."[11] In one case a "road or path" is spoken of as being sufficient for "loaded carts and wagons."[12] The road system grew in large part by the gradual extension of private roads and paths back to new settlements and the ultimate recognition of these roads as public highways.

The roads in Maryland, being laid out by each county, developed according to no regular or systematic plan, except in so far as most counties faced similar obstacles of land and water and overcame them in similar ways. The main feature of the system was that a road ran up each side of the bay, cutting across from the head waters or the ferry of one river to the head waters or ferry of the next, with branch roads running off into each of the many necks of land between the more important streams. This plan is a geographical necessity, and remains to the present day the outline of a great part of Maryland's road system. The multiplicity of creeks and rivers made necessary a vast number of roads, often short and unimportant and always crooked. Moreover, even the main routes did not run straight from place to place, but zigzagged about, avoiding a hill here and a swamp there, until they formed a veritable maze in the forest.

[9] Baltimore County, Court Records, March, 1739/40, Liber HWS No. 11, p. 149.

[10] Frederick County, Court Records, August, 1749, Liber A, p. 135; Queen Anne's County, Court Records, November, 1737, Liber 1735–1739.

[11] Petition Book, June, 1731, p. 165.

[12] Cecil County, Court Records, August, 1760, Liber FK No. 3, p. 452.

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The most important roads in the province were those forming the main line of travel between Philadelphia and Virginia. This route divided in Delaware and entered Maryland by two branches. One branch ran down the Eastern Shore, crossed the Elk River at Bohemia Manor, thence to Frederick and Georgetown on the Sassafras River, thence to Chestertown on the Chester River, thence either to Rock Hall or East Neck Island on the bay side of Kent County and by boat to Annapolis, or across the river at Chestertown and down through Queen Anne's County to Kent Island, where a boat was taken to Annapolis. This was the route most frequently taken. The other branch of the road from Delaware reached Annapolis around the head of the bay,[13] running past the head of Elk River to North East, to Susquehanna ferry near Port Deposit, to Joppa, to Baltimore, thence either across the Patapsco at Ferry Bar or around by Elk Ridge, and to Annapolis. A little way from Annapolis the road again divided, one branch crossing the Patuxent at Queen Anne Town and leading to Upper Marlboro and Addison's ferry opposite Alexandria, and the other crossing the Patuxent at Nottingham and passing through Piscataway to the main ferry across the Potomac near the mouth of Pope's Creek.[14] All of these roads were probably in existence by 1720.

The territory along the Monocacy and to the west furnished through traffic that demanded a separate road system. This region was settled by two streams of immigrants, the first moving across southern Pennsylvania and then turning south along the mountains, and the second pushing slowly up the Potomac River. Each stream of settlers constructed its own road. As the Pennsylvanians were the first to

[13] In Cecil County this road is often spoken of as the King's Road or the King's Highway (Cecil County, Petition Book, November, 1721, p. 26).

[14] Maps by Jefferson and Fry and B. F. Pownall; L. Evans, Geographical . . . Essays; T. Chalkley, A Collection of the Works of, pp. 309–312; The Vade Mecum for America, Or a Companion for Traders and Travellers, p. 203; Callister MSS., July 14, 1762; Hamilton's Itinerarium, p. 1; "William Gregory's Journal," in William and Mary Quarterly, vol. xiii, pp. 226–229.

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arrive, the great wagon road from Philadelphia and Chester west through Lancaster and York to the mountains served for some years as the only outlet from all this region. Branches of this route extended through Harper's Ferry and well down into the Virginia valleys. As the Potomac settlers moved westward, they extended link by link their tide-water road system farther up the river. In 1720 the Prince George's County roads seem to have extended about to Rock Creek.[15] By 1728 a road had been pushed as far back as the Monocacy,[16] and shortly thereafter an elaborate system was developed connecting the western settlements with the county seat and with tide-water on the two branches of the Potomac.[17]

Neither the Philadelphia wagon road nor the Potomac River roads were suitable to the needs of the western communities. A road directly across from the Monocacy to the Chesapeake would be much shorter, consequently in 1739 there were sent to the assembly "a Petition of the Inhabitants about Monoccacy, and above the Mountains on Potowmack River, A Petition of the Inhabitants on the West side of Patowmack River, on the back Parts of Virginia. A Petition of the Inhabitants at and about Manoccacy Creek. And, a Petition of the Inhabitants to the Northward of the Blue Ridge, alias Chenandore Mountain: By which Petitions the several Petitioners pray, that a Road may be cleared through the Country from the City of Annapolis, for the more easy Carriage of their Grain, Provisions, and other Commodities."[18] Although this request was the birth certificate of Baltimore City, it received very little attention from the assembly, and was referred to the next session. There is nothing to indicate that the legislature ever resumed the subject of a through highway to the western part of the province. Roads were county affairs, and this road was left

[15] Prince George's County, Court Records, November, 1720, Liber K, p. 7.
[16] Ibid., November, 1728, Liber O, p. 331.
[17] See road enumerations in successive November courts.
[18] Lower House Journal, May 14, 1739.

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to those sections. Just when the road was cleared is not certain. In neither Prince George's nor Frederick County do the records make any mention of the first construction of the highway, but a petition in 1749 mentions "the main Waggon Road from Annapolis to Fred^k Town" and "the Road that leadeth from Baltymore Town to Diggs Copper Works."[19] The silence of the records indicates that these roads were cleared by private initiative.

The great outburst of activity and interest in Frederick affairs about 1745 suggests that the opening of the first road might have occurred about that time. The route of the road is as doubtful as the time of its construction. In a general way, of course, it struck across from the Patapsco as directly as possible to Frederick, probably following the route of the Frederick Road of later days. Branch roads led not only to the several districts of Frederick County, but also across the border into Pennsylvania, down to Winchester, Virginia, and farther and farther back into the mountains as settlements were made.[20] This system was greatly extended, especially up the Potomac to Cumberland, by the military operations of the French and Indian War.[21] It is probable, also, that several roads were soon cleared across to Baltimore, through traffic thus following various channels.[22]

As a part of the general system of roads mention should

[19] Frederick County, Court Records, August, 1749, Liber A, p. 135.

[20] Ibid., June, 1750, Liber A, p. 552; November, 1761, Liber L, p. 291; March, 1762, Liber L, p. 373.

[21] W. Sargent, ed., The History of the Expedition against Fort Du Quesne in 1755, p. 308; Archives, vol. ix, pp. 164, 165, 206. Governor Sharpe feared that the Pennsylvanians would oppose the building of an army road from Frederick to Cumberland because it would give Maryland an advantage in trade (Archives, vol. ix, pp. 230–231).

[22] Two petitions to the Frederick County court in 1761 ask for the clearing of roads to Baltimore Town to fall in with "a Road lately open'd from George Touxes to said Town" (August, 1761, Liber L, pp. 230, 231). Records never speak of "the road to Baltimore;" they always speak of "a road to Baltimore," or "the road that runs from —— to Baltimore." These expressions leave little doubt that several roads were in use between Baltimore and Frederick County. Pownall's map also shows a road from Baltimore north into Pennsylvania. Such a road would belong to this same system.

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be made of the portages that became of much use in the transportation of freight on the Eastern Shore. Difficulties of land traffic forced the colonists to resort as often as possible to water. Consequently, wherever the head of navigation of a river flowing into the Chesapeake approached the head of navigation of a river flowing into the Delaware, there developed a traffic up the one, then across by portage, and down the other stream. The Maryland and Delaware peninsula has many such portages, and the records of the counties along the Eastern Shore show that much traffic passed in this way. The northernmost portage was from the head of Elk River across to Christiania Bridge, the modern Wilmington, a distance of about twelve miles. Somewhat more used than this—in fact, the most used of all the portages—was one from Cantwell's Bridge at the head of Apoquinney Creek to Bohemia Landing on Elk River near the present Elkton. Large ships could come up to both landings, and the distance between them was only about eight miles. Just below Bohemia, on the Sassafras River, was Fredericktown. From here, also, by a haul of about fourteen miles goods often went across to Cantwell's Bridge. From Salisbury on Duck Creek, Delaware, there were portages across to both the Sassafras and the Chester River, each about thirteen miles distant. About the middle of the peninsula there was a somewhat less used portage of six or seven miles from Choptank Bridge to the Motherkill. Still farther south there were three very much used portages: from the Nanticoke River to Broadkiln Creek, from the Nanticoke to Indian River, and from Snow Hill on the Pocomoke River to Sinepuxent Bay, in length about twelve miles, thirteen miles, and five miles respectively.[23] Over these portages was carried much of the merchandise entering and leaving the Eastern Shore, and not a little to and from points on the Western Shore and in Virginia.[24]

These three systems—the roads leading north and south connecting Virginia and Pennsylvania, those leading out

[23] Pownall's Map; Evans.
[24] Clark Letter-book, p. 92.

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north and west from Baltimore, and the portages connecting the heads of rivers in Maryland and Delaware—constituted the main arteries of through travel. Off from them in every direction a vast number of local roads, public and private, led down each neck, or peninsula between creeks or rivers. These roads formed a network without system or regularity. Their design in the tide-water counties was not to feed into the main arteries, but merely to strike the shortest and best route to the great objective points,—the church, the public landing, the county court, and sometimes the mill.[25] In the western regions, while of course the local needs were taken care of, there was also the idea of connecting with the main roads to Baltimore.[26]

The extension of highways made by the colony during

[25] A Prince George's County road was described as "a very Publick Road out of Charles County to a ferry from Permonkey over into Virg[a] also very much used by the Neighbourhood being a Church Road Market and Mill Road for most of the Neighbours" (Court Records, March, 1741, Liber Z, p. 531). Such expressions are not infrequent.

[26] Petitions for opening roads in the several counties reveal the purposes of the petitioners concerning their road system. The following are two examples.

"Inhabitants } To the Worshipful Court of Dorchester nowe
Petition } sitting. The Petition of us the Subscribers humbly sheweth that there is a certain large Neck bounding upon Fishing bay and running between firm Creek and raccoon Creek and running to Hunger River Chappell and a Considerable number of people living in it and we have no road to the Chappell or Elsewhere out of the said Neck we therefore humbly desire of Your Worships to grant us an Order to Clear a Road from the said Chappell into the said Neck and that the men living between the said two Creek and the Chappell may be appointed to clear the said Road and further that Your Worships appoint one of those said Men Overseer of the said Road and Your Petitioners as in duty bound shall ever after pray" (Dorchester County, Court Records, November, 1733, p. 241).

"To the Worshippfull Court of Frederick County now sitting the Petition of a number of The Inhabitants of the Upper Hundred of Monocacy Humbly Sheweth that whereas we have Laboured under much Hardship and disadvantage for want of a good Road to the nearest Landing Vizt. Baltimore Town We humbly Request that your Worships would be pleased to grant us an order for opening and clearing a Road from the Temporary Line along a Gap in the Mountain to John Lillies Mill and from thence a straight Course to Baltimore Town until it fall in with a Road lately open'd from George Touxes to said Town" (Frederick County, Court Records, August, 1761, Liber L, pp. 230, 231).

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the period between 1720 and 1765 was the source of much of its progress in other ways. No estimate of mileage is possible, but successive enumerations in the county court records leave no doubt about the rapid opening of new roads. For example, in Queen Anne's County the enumeration of 1730 divided the county into nine overseers' districts; that of 1758 showed thirty. The significance of these figures is that in 1720 the colony was still a series of scattered settlements spread along the waterfront with little communication by land, while in 1765 it had become a community every part of which was accessible from every other part.

The character of these roads varied in different sections. On the Eastern Shore and in other parts where the land was level, road-making was a comparatively simple matter, but in the rough country of western Maryland many more difficulties were encountered. While the roads in different sections thus differed in the matter of rocks, hills, and streams, they were all alike in being built and maintained in the cheapest possible manner. Little more was done in road construction than to clear away the trees and undergrowth, and here and there, where the necessity was great and the traffic warranted, to build a bridge or a causeway. The small cost of roads is best attested by the willingness with which the people undertook to construct new roads or to change old ones. A Queen Anne's County petition says of a proposed new road, "as the road will not be above five miles long, it will be no expense."[27] Very frequently individuals presenting petitions that roads be changed undertook to do the work at their own cost. The trivial reasons assigned in many of these petitions throw an interesting light upon the character of the roads. John Gwinn and Charles Yates, of Charles County, requested that a new road be built because the old one passed through their land, and in consequence their gates were frequently propped open and

[27] Court Records, March, 1764.

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their fences pulled down.[28] In another instance a road was turned partly because it was "used by Sundry Persons resorting to the . . . ferry where getting disordered does not Value leaving Open such Gates they shall come across."[29] In Cecil County a new road was constructed, "somewhat longer than the old," because the latter passed through a plantation that was "scarce of rail timber" and could not well afford to maintain fences.[30] Changes for this reason are not infrequent. Another petition to change the course of a road was granted because the petitioner lived on the main road and was much troubled by travelers and was frequently aroused at unseasonable hours.[31] These statements show how little work a road represented, and we can draw our own conclusions as to the kind of highways such work must have produced.

One feature of the colonies which is very apt to be forgotten, or at least to be underestimated, is the prevalence of forests and the fact that the roads ran almost exclusively through the woods. As late as 1788 Brissot de Warville said that the road from Susquehanna to Baltimore was always in the midst of forests.[32] Schoepf also complained of the monotonous woods on the way from Baltimore to Alexandria.[33] The inhabitants, in fact, preferred that their roads should be through forest.[34] Routes were cleared regardless of the ownership of the land, and ran almost continuously through tracts belonging to private individuals. When these lands were brought into cultivation, the owners laid off and

[28] Court Records, June, 1728, Liber Q No. 2, binding 36, p. 117.
[29] Prince George's County, Court Records, March, 1742, Liber AA, p. 355.
[30] Petition Book, p. 90; see also Court Records, August, 1760, Liber FK No. 3, p. 452.
[31] Baltimore County, Court Records, August, 1728, Liber HWS No. 6, p. 26.
[32] Vol. i, p. 364.
[33] J. D. Schoepf, Travels in the Confederation [1783–1784], (Alfred J. Morrison, tr.), vol. i, p. 348.
[34] In 1788 Brissot de Warville said that from Wilmington "to the head of Elk you see but few plantations, you run through eight miles of woods, only meeting with a few log-houses, when you arrive at Henderson's tavern, a very good inn, alone in the midst of vast forests" (vol. i, p. 363).

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fenced their fields without regard to the highways, only placing gates where their fences crossed the roads.[85] When the road was not enumerated by the county justices, or even when it was, the planters, either by petition to the justices or in defiance of the laws, often turned the roads aside so that they would not interfere with the new plantation. A Frederick County petition in 1758 spoke of an old Indian road "which is now rendered almost impracticable by plantations."[86] A Cecil County petition says still more explicitly: "Neighbours and New Comers are now Settling so Close & thick that we are likely to be Stopped from having any passage that way which will be a great & Grievous Inconvenience causing us to Travel a great many Miles (Meander like) to seek our way."[87] In 1751 the governor referred to this matter in his speech to the assembly as follows: "While other Nations are improving their Commerce, by opening Canals, and shortening and mending their Roads, we are lengthening Ours in many Parts of the Province, by Windings and Turnings, and obstructing their Passage, with Gates and other Incumbrances."[88]

The care with which the roads were maintained varied in the different communities and with different overseers. In general, the road administration was rarely ever efficient. The laws required that the roads should be cleared and well grubbed and should be twenty feet wide, and that all dead trees that might fall across them should be removed. All roads to a ferry, court-house, church, the city of Annapolis, or the town of Oxford were to be marked by two notches cut into the trees at each side of the road. At the point where one road left another, distinguishing notches or brandings were to be placed, which told whether the road led to

[85] A Charles County man asked permission to turn a road aside because in its old course it had three gates in a quarter of a mile (Court Records, June, 1757, Liber F No. 3, binding No. 50, p. 484).
[86] Court Records, August, 1758, Liber K, p. 7.
[87] Petition Book, November, 1729, p. 141. See also Cecil County, Petition Book, June, 1723, p. 28; Queen Anne's County, Court Records, November, 1737, Liber 1735–1739; Charles County, Court Records, June, 1725, Liber P No. 2, binding 35, p. 3.
[88] Lower House Journal, May 15, 1751.

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a church, ferry, court-house, Annapolis, or Oxford. Wherever a road ran through "old fields" or a plantation, posts bearing these marks were to be erected near enough together to be seen from one to the other.

These provisions sound very well, but they were not often adhered to.[39] In 1750 the council appointed the attorney-general to look after the administration of the road laws, and made the following complaint: "It appears to this Board that in the several Counties of this Province the Publick and main Roads therein are not cleared, and well grubbed, fit for traveling, neither are they twenty feet wide, nor marked agreeable to the Act of Assembly."[40] Other complaints frequently heard were that the roads were allowed to grow up in bushes, that they were miry, and that they were stopped up by trees blown across them.[41] A Dorchester petition says: "the Road that leads from Transquaking bridge to the Lower Bridge of Chicomacomico . . .

[39] Schoepf complained that the roads were supposed to be kept up, but were nowhere attended to (vol. i, p. 348).

[40] Archives, vol. xxviii, p. 492.

[41] A petition of Augustine Hermann in 1775 said that "part of Delaware highway Road leading from Choptank to Delaware . . . being not only an Antient Way for Travelers but also the bounds of your Petitioners Bohemia Mannor has for some time been Neglected to be Cleared & is much stopped and Grown up to the prejudice of Travellers" (Cecil County, Petition Book, p. 89). Brissot de Warville's description of the road from Susquehanna Ferry to Baltimore runs as follows: "Du bac de la Susquehannah jusqu' à Baltimore, va compte environ soixante milles.—Nous consacrâmes un jour à les parcourir; nous trouvâmes presque par-tout des chemins affreux, dans un terrein argilleux, rempli de profondes ornières, toujours au milieu des forêts, souvent obligés de nous ouvrier un nouveau chemin, l'ancien étant obstrué par des arbres que le vent avoit abattus. On ne conçoit pas comment les voitures ne versent pas souvent. On le doit à leur construction particulière; elles out peu de ressorts, & consequemment peu de jeu; on le doit à l'adresse des conducteurs, qui dirigent fort bien leur chevaux, habitués à ces sortes de routes.—Mais pourquoi ne les répare-t-on pas? Il y a bien des inspecteurs nommés pour examiner les chemins, & quelquefois méme on prononce des amendes. Mais la collusion & la difficulté de les lever rendent la loi inutile: tout se dégrade donc, c'est un des effets de l'esclavage" (J. P. Brissot de Warville, Nouveau Voyage dans les États-Unis de l'Amérique septentrionale, fait en 1788, vol. ii, pp. 177, 178.) See also Charles County, Court Records, Liber Q No. 2, binding 36, p. 117; Cecil County, Petition Book, March, 1724/5, p. 79.

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is now tolerably well repaired," but "the path that leads Down the Neck amongst us is so grown up with bushes and old trees blown down across the same and the heads of several Branches so wet and miry that man and horse can scarcely pass without great Danger in the winter."[42] These accounts do not make a very flattering picture of the roads, but all sources agree on the lines of the picture as painted. The most favorable comment to be found is by Alexander Hamilton, who said of Kent County, "The roads here are exceeding good and even, but dusty in the summer, and deep in the winter season."[43]

A very essential part of the road system in a country as well watered as Maryland is the means of crossing marshes and streams. The custom of transporting tobacco hogsheads by rolling made it particularly necessary for roads to be dry and streams to be bridged. Over the numerous swamps, therefore, causeways were frequently built. A description of such a causeway is given in the specifications for the construction of one across the marshes of Kent Narrows in Queen Anne's County. It was to be thirteen feet wide at bottom, ten feet at top, and was to rise two and a half feet above the level of the marsh. Where needful in soft and miry places it was to be underlaid with poles or logs, and enough stakes were to be planted to keep them in place. The whole causeway, possibly about a mile long, was to be constructed at the contract price of twelve thousand pounds of tobacco (about £50 sterling), the county furnishing labor to haul the logs and poles.[44] By an act of 1753 it was required that mill owners building dams where roads had formerly passed should make the top of the dam twelve feet wide so that it might serve as a causeway. They were then excused from work on any other part of the road.[45]

Causeways were not equal to the emergencies of tide or

[42] Court Records, August, 1733, p. 99.
[43] Hamilton's Itinerarium, p. 10.
[44] Court Records, 1723, Liber JK No. B, p. 205.
[45] Bacon, ch. 16.

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running water. In dealing with these it was natural that the colonists should at first follow up the smaller streams to fording places, and use them as their regular means of crossing. Not a few fords or "wading places" are spoken of in the county records, but in rolling tobacco a ford, no matter how passable, is a serious obstacle, and at times of freezing and freshets may become impassable.[46] Across the smaller streams nothing but bridges could meet the needs of the colonists. There were no special legal provisions for the erection of bridges, the makers of the law of 1704 probably assuming that such work would be carried out by the overseers in the course of the regular road work. The task proved too difficult for the overseers, however, and the counties fell into the habit of building bridges by special contract. The expense was borne by the county levy.[47] A peculiar arrangement was occasionally made by which the contractor agreed not only to build the bridge, but also to maintain it for a period of years.[48] Bridges between counties were built by a joint commission from the two counties and the expense was divided.[49] On several occasions attempts were made to have the assembly aid in the construction of bridges, a proposal to this effect in 1719 being rejected by the Lower House.[50] In 1737 Baltimore County petitioned for provincial aid in constructing a bridge. The Upper House decided that if any money was to be contributed to such a purpose it should be distributed equally

[46] "Passage over Senecar Creek is often Dangerous by Reason of Freshes & Frost & very Difficult at all times to Transport Tobacco often to its Damage" (Prince George's County, Court Records, Liber X, p. 115). The keeper of the ferry over the mouth of the Monocacy River in 1748 agreed to keep a cart to carry over tobacco and other things when the water was low (Frederick County, Court Records, March, 1748, Liber A, p. 15).

[47] Cecil County, Petition Book, November, 1722, p. 40.

[48] Frederick County, Court Records, June, 1762, Liber L, pp. 448, 450; Prince George's County, Court Records, August, 1738, Liber X, p. 177; November, 1739, p. 276.

[49] Appointments of commissions may be found in Queen Anne's County, Court Records, March, 1732, June, 1747.

[50] Lower House Journal, May 29, 1719.

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between the counties.[51] The principle of county control of roads was again upheld, and no money was appropriated.

All bridges, except those repaired by contract, were regularly kept up by the road overseers. In 1724 the complaint was made that many bridges were much out of repair, and that the overseers contended that they were unable to make repairs because the owners of land had warned them against cutting the necessary timber. It was enacted that overseers might cut timber from adjacent lands regardless of the owner's warning, but no timber suitable for clapboards or coopers' use should be taken.[52]

Though small bridges were very numerous, it was far beyond the engineering resources of the colonists to bridge the large rivers. Over these streams was established a series of ferries, becoming gradually very numerous, and the system was thought at that time to be remarkably efficient. Governor Sharpe wrote in 1764 that ferries were established over every river where roads crossed and that a ferryman was constantly in attendance.[53] Eddis also, after remarking that one could not travel any considerable distance without crossing rivers, added: "Over these, regular ferries are established, at the charge of the respective counties; but though every proper method is adopted for expedition, yet such a number of considerable waters unavoidably occasion great delay."[54]

The usual ferry consisted of a flat-bottomed scow, about eight feet by thirty,[55] which was propelled back and forth by the ferryman's pulling on a heavy rope stretched across the river. A Baltimore County contract called for a rope at least four and a half inches around.[56] Other contracts required that the scow be well floored, and that it carry from

[51] Upper House Journal, May 3, 1737.
[52] Bacon, 1724, ch. 14. In 1751 the assembly voted to continue this method of confiscating timber for repairing bridges (Lower House Journal, June, 1751).
[53] Archives, vol. xiv, p. 180.
[54] W. Eddis, Letters from America, p. 19.
[55] That is the size of one mentioned in Prince George's County, Court Records, November, 1742, Liber AA, p. 222.
[56] Court Records, August, 1754, Liber BB No. A, p. 443.

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three to six horses.[57] These boats, being flat-bottomed, were able to come close ashore, so that by the letting down of a large apron, or gang-plank, horses and men might pass over to dry land. Occasionally mention is made of a causeway, or even a wharf, built out to facilitate landing. Another sort of ferry was employed to transport passengers across the Chesapeake Bay or such mighty rivers as the lower Potomac. The water at these places varied from three or four to twenty or thirty miles in width, and the ordinary rope-hauled ferry was impracticable. To meet these conditions, commodious sailing boats were provided sufficient to accommodate men and horses on what might prove a tedious and perilous voyage. Sometimes small boats were also kept to provide for travelers without horses.[58]

Passage over these ferries was not always easy or safe. The longer ferries, such as those across the lower Potomac and those from Annapolis to Kent Island and Rock Hall, were on waters noted for sudden gusts and squalls, and were subject to all the difficulties of inland-water navigation. Even the shorter ferries across smaller rivers were not entirely safe. Especially dangerous was the passage with horses. Chalkley tells us that while crossing the Potomac at Piscataway, where the river is about four miles wide, his boat was struck by a great swell which knocked the horses from their footing and nearly filled the boat with water.[59] Hugh Jones also tells us that he lost a brother at the Chickahominy ferry in Virginia.[60]

Even when the element of danger was omitted, the ferries were a constant source of trouble and delay. At best, it was slow traveling when a heavy, loaded boat had to be pulled across a stream by the ferryman and his passengers. Often the ferry-boat was on the other side when needed, and two complete trips had to be made before the traveler was landed

[57] Court Records, November, 1733, Liber JWS No. 9, p. 126; November, 1750, Liber TR No. 6.

[58] Maryland Gazette, March 24, April 26, 1745; June 24, 1746; Callister MSS., July 14, 1762; "William Gregory's Journal," p. 228.

[59] P. 312.

[60] P. 51.

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on the opposite shore. When this happened on the Annapolis-Rock Hall ferry, several days might be lost.[61] What was still more exasperating was to find the boat on the other side and the ferryman indifferent about responding to the hail, or even away from his post altogether. In order to avoid the delays incident to finding the boat on the opposite side of the river, Queen Anne's County in 1728 established a second ferry across the Chester River at Chestertown so that one boat might be maintained on the Queen Anne's side.[62]

Complaints against the ferrymen are numerous. A Cecil County petition of 1721 charged "that the County ferry over Elk River to and from our s^{d} Court house hath of Late been kept by Negroes whose Master being for the most part absent hath been very Negligient in Discharging their Duty."[63] So frequent were complaints about this time in Cecil County that in November, 1722, the court entered on its records the following memorandum: "It is Mutually agreed by the Justices af^{d} as a Standing rule of this Court that in Case aney Just Complaint be made, against the ferry men of the County, before Two Justices of the peace that then it shall be in their power to turn out Such Delinquant and Put in another in his Stead and Place."[64]

As to the manner of control, ferries fell into two great classes, private and public. The private ferry was the ordinary toll institution supported entirely by fees from patrons. In this class belonged all the bay ferries, most of those across the Potomac,[65] and probably many across rivers lying entirely within the colony. These private ferries were subject to no legal control, but competition for business was in some cases very keen and must have exerted some beneficial influence.

[61] "William Gregory's Journal" [October 12, 1765], p. 228.
[62] Court Records, November, 1728, Liber PT No. A.
[63] Petition Book, p. 25.
[64] Ibid., p. 41.
[65] Maryland Gazette, April 26, May 24, 1745; June 24, 1746, etc. An advertisement in the Maryland Gazette of July 29, 1746, shows that Virginia maintained at least one public ferry across the Potomac. Residents of Maryland, however, probably had to pay tolls.

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The public ferries were usually superintended by the county courts. The courts located the ferry, contracted with the ferryman, and included in the county levy the ferryman's pay. The amounts of these salaries varied widely. Five hundred pounds of tobacco was all that Baltimore County paid for the maintenance of Patapsco ferry in 1719.[66] The same ferry in 1723 paid seven thousand pounds of tobacco,[67] while three, four, five, six, and even eight thousand pounds of tobacco per year were ordinary sums paid by the courts for such service.[68] The memorandum quoted above is the only exception to the general rule that the whole court appointed the ferrymen. Occasionally, special requirements or exemptions were inserted in the contract. The number of horses to be carried, the number of men to be in attendance, the time of attendance (either from sunrise until sunset or at all times), the requirement that the ferry transport wheat or other produce, and the exemption from the same, the transportation of church-goers on Sunday,—all these are to be found in one or another contract between ferrymen and the court.[69] At times the public ferries seem to have been free to all persons,[70] and at other times this privilege seems to have been enjoyed only by the residents of the county that maintained them.[71] The lack of evidence on this point would indicate that in general the public ferries must have

[66] Court Records, November, 1719, Liber JS No. C, p. 242.

[67] Ibid., November, 1723, Liber JS No. TW, p. 83.

[68] Ibid., 1731, Liber HS No. 7, p. 158; November, 1750, Liber TR No. 6; Queen Anne's County, Court Records, November, 1728, Liber PT No. A; Cecil County, Court Records, November, 1718, Liber DK No. 1, inverted p. 150; Baltimore County, Court Records, November, 1718, Liber JS No. C, p. 39; Prince George's County, Court Records, November, 1742, Liber AA, p. 222.

[69] Baltimore County, Court Records, November, 1733, Liber JWS No. 9, p. 126; November, 1750, Liber TR No. 6.

[70] Maryland Gazette, March 22, 1753.

[71] A petition was submitted in 1721 to the Baltimore County court from several planters, who lived in Anne Arundel but had quarters with taxables in Baltimore County, asking that as they paid taxes in Baltimore, they and their messengers should have free passage on Patapsco ferry the same as if they lived within the county (Court Records, March, 1720/1, Liber JS No. C, p. 438). A Frederick County contract restricted the ferryman to not over four pence for man and horse and four shillings for wagons belonging to non-residents (Court Records, March, 1748, Liber A, p. 15).

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been free to all, for otherwise some complaints about rates would surely be heard.

Though the county courts managed to keep their control of ferries, their jurisdiction was constantly in dispute. The charter granted the lord proprietor "as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights, and temporal franchises whatsoever, . . . as any bishop of Durham . . . ever heretofore hath had." Somewhere in this blanket grant of power, the proprietor claimed, was the right to establish and license ferries. In the instructions to the agent, Nicholas Lowe, in 1723, ferry licenses are referred to as an established thing,[72] and in 1731 an account of the proprietary revenues shows a total of £13. 10s. sterling from this source.[73] In 1733 the agent was instructed as follows: "whereas the Justices of Several County Courts have taken upon them to agree for certain rates with persons for keeping Ferrys over several of the Rivers within my province, for the Inhabitants of their Several Countys, & to assess those Rates upon the Inhabitants without any law to warrant such assessment which practice is not only an Invasion of our Right, but an Injury to the people who are assessed contrary to Law; you are therefore hereby Directed to take proper measures to put a Stop to such Illegal practices & to take all necessary care that neither our Right nor property be Invaded or the people Injured or imposed on in that particular."[74] From that time on the contest was waged.

At the November court of that same year in Baltimore County there was read a letter from Daniel Dulany claiming for the proprietor the right to allow ferries, and threatening prosecution against all ferrymen who failed to take out a license from the proprietary agent. The justices entered a formal denial of the proprietor's claims in this matter, and wrote to Governor Ogle to that effect.[75] Notwithstanding

[72] Calvert Papers, MS., No. 278.
[73] Ibid., No. 912.
[74] Ibid., No. 278; No. 295½, p. 61.
[75] Court Records, November, 1733, Liber JWS No. 9, p. 127.

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the popular protest, the proprietor's representatives began to enforce their claims by a series of lawsuits against all who failed to purchase licenses. Just what success was attained is not known; but in 1741 the committee of grievances of the Lower House of Assembly reported as follows: "Complaint is made to your Committee, that Persons Traveling the King's High-Ways of this Province, are stopt and hindered in their Journeys, and prosecuting their lawful Affairs, tho' of never so great Importance Publick or Private, by means of the Restraint laid on the several Ferries on such High-Ways, by his Lordship's Agents and Ministers, who by vexing and terrifying the People with vexatious Law Suits and heavy Fines who should (as usual it had been) transport or carry over such Ferries in the High-Ways aforesaid, his Majesty's Subjects, unless they should have First compounded with his Lordship's Agents or Ministers for an exorbitant and yearly Sum, to be paid out of their Labour, by way of a Fine for a License for so doing." This was followed by a long argument against the proprietor's right to such a prerogative. The report was concurred in by a vote of 36 to 3.[76] The protest of the assembly brought the proceedings to a halt, and throughout the life of the old proprietor the claim was allowed to sleep.

The young proprietor again put forth this claim, and in 1752 issued instructions that "It is necessary also to have a distinct account of all Tenants holding Ferrys in each County, whether granted by Leases to the County Courts or private Persons."[77] No headway whatever was made in the matter.[78] In 1761 Lord Baltimore must again have been

[76] Lower House Journal, June 12, 15, 1741. A copy of the license issued to a Severn River ferryman includes the following list of tolls that might be charged: for every man with horse, 12d. currency; man alone, 6d. currency; for every coach, chaise, wagon, or cart, 2s. 6d. currency; for every horse drawing the same, 6d. currency; for every steer or cow, 6d. currency; and for every sheep or hog, 2d. currency; the proprietor, governor, councillors, chancellor, commissary-general, secretary, agent, and attorney-general, with their servants, attendants, and horses, were to travel toll free.

[77] Calvert Papers, No. 2, p. 143.

[78] Governor Sharpe wrote the following summary of the controversy: "His Ldp also claims as his Right by prerogative a Fine

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seeking to revive this claim. Something from the proprietor elicited the following reply from Governor Sharpe: "I beg leave to inform Your Ldp that there never hath been since the Country was settled any Money paid by the Keepers of Ferries in this Province for Leave or Lycence to keep them most of the Ferries over the Rivers in this Province are supported & the Keepers of them paid by an Allowance made them every year in the County Levy, & those who are not so paid demand & receive from Passengers such Rates as they have themselves settled."[79] Although Sharpe was not exactly accurate in his historical statements, he expressed the final conclusion on the condition of the ferries. He might well have added in the words of a former letter, "most certainly a Regulation is necessary but the people will never vest the proprietor with the Right & power of granting Lycences, & he will not pass a Regulating Bill witho^{t} it." This last statement shows why ferries were left entirely to county control without any provincial legislation.

Over these highways passed the traffic and travel of the colony. The most important article of transportation was tobacco. In the earliest days every plantation stretched along the water front, and the tobacco did not have to be moved a great distance; consequently, wagons were unnecessary, and the colonists fell into the habit of rolling the hogsheads from the barns to the landings.[80] As settlements

for Lycencing Ferries, so did the late Lord once & to quiet the peoples Clamour immediately dropt the Affair, at this time some of our Ferries are kept by Order of the County Courts the person who keeps the Boats has a Sum of Tob^{o} levied by the Justices on the C^{ty} for his payment and the Ferry is free, other Ferries are kept by private persons who demand of Passengers what they please & passengers must pay their Demand or be refused conveyance, most certainly a Regulation is necessary but the people will never vest the proprietor with the Right & power of granting Lycences, & he will not pass a Regulating Bill Witho^{t} it" (Archives, vol. vi, p. 236).

[79] Ibid., vol. ix, p. 509.

[80] In most instances the method of rolling the tobacco was simply to put several men behind the hogshead to push it. There are, however, still traditions in the tobacco counties of the State of so packing the hogshead that a pole could be put through the center, to which a horse might be harnessed. This method may have been

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pushed back, this method of transportation continued in vogue, so that in the middle years of the eighteenth century tobacco was sometimes rolled over great distances. As settlements pushed up the Potomac, tobacco-producing communities were located as much as thirty or forty miles from water facilities. From the upper waters of the Patuxent, from the region of Sugar Loaf Mountain, even from Seneca and Monocacy Creeks tobacco was rolled down to tide-water on the Potomac.[81]

This method of transporting tobacco was, from the point of view of the merchants, anything but satisfactory. The shattering of the tobacco caused by a long roll was such as to diminish greatly its value, and occasionally the head was jostled out of the hogshead, with very disastrous results.[82] In 1719 several shipmasters petitioned against the practice. In the letter from the London merchants to the Maryland planters in 1729 it was said that the Virginia planters had ceased to roll tobacco, and Marylanders were strongly urged to do likewise.[83] But the merchants had another interest in the moving of tobacco besides the protection of the crop. It was an old custom that the sailors of the vessels should receive the hogsheads at the planters' barns, and roll them to the water. When plantations were along the rivers, this was a slight burden, but as settlements pushed back, the sailors began to complain. A sympathetic description of the sailors' lot was given in an anonymous pamphlet of 1727. "The Rolling of our *Tobacco,*" it says, "which may be easily done with Horses, and is indeed unfit for Men, wou'd remove the

in use in Maryland during colonial days, but I have seen no records that indicate it. Hugh Jones, speaking of Virginia, said that tobacco was rolled, drawn by horses, or carted (p. 55).

[81] Prince George's County, Court Records, August, 1746, Liber FF, p. 6; November, 1746, Liber FF, p. 178; March, 1744, Liber CC, p. 294.

[82] "The Tob°. they buy is often roll'd 20 Miles & upwards w^h^. is not only a great charge upon it, but it is always damaged by it & shaken to pieces both inside and outside" (Callister MSS., about 1745). See also "Letter by A. B.," in Maryland Gazette, May 5, 1747.

[83] Lower House Journal, May 21, 22, 1719; Maryland Gazette, April 15, 1729.

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Reproach which *Maryland* but too justly lies under, of being one of the worst countries in the Universe for Sailors; For, beside the Fatigue of long Rolls, the People are so very backwards (in many parts of the Country,) in getting their *Tobacco* ready, that it is mostly to be Roll'd when the Weather is excessively hot. The Labour and Heat together being vastly disproportionable to a Man's Strength, his Spirits are exhausted to that degree that he is in danger of being destroyed by the Draught of cold Water he drinks, which has been the melancholly Fate of many an able Sailor."[84] We omit the picture of the sailor's bereaved family which follows.

In response to the complaints of the merchants, the assembly in 1727 required under a penalty of one hundred pounds of tobacco that all persons paying out tobacco should, within five days after receiving a written request, roll their hogsheads to within a mile of some convenient landing. Six pence per mile was to be allowed on every hogshead by the person ordering it to be rolled. All persons who shipped their own tobacco were also to roll it within a mile of a landing.[85] In the next year complaints were so numerous that the assembly repealed this clause.[86] There appears to have been no other legislation on this subject until the tobacco inspection act of 1747. This law relieved the merchants of the necessity of having their sailors gather up the tobacco, but it did not make any change in the custom of rolling it. In fact, this remained the regular method of transporting that crop in Maryland down to the end of the colonial period.

The prevalence of rolling does not necessarily argue the absence of horses. Packhorses seem to have been used

[84] A Letter from a Freeholder, to a Member of the Lower-House of Assembly, Annapolis, 1727, p. 9 (New York Public Library).

[85] Laws of 1727, p. 11.

[86] Lower House Journal, October 31, 1728; Laws of 1728, p. 15; Bacon, 1728, ch. 10. A Memorial Relating to the Tobacco-Trade. Offer'd to The Consideration of the Planters of Virginia and Maryland, Williamsburg, 1737 (John Carter Brown Library), says that Marylanders have to roll tobacco to landings so that sailors can get it.

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occasionally on the frontier,[87] but no mention is ever made of them in the tide-water region. In the early years of the eighteenth century wagons seem to have been very scarce, for few references are made to them in the records; but as the century advances notices become somewhat more frequent. The merchants' letter referred to above asserted that the people had plenty of horses and might have carts or sledges, which certainly implies that the latter were not very numerous. The inventories of intestates' property, though occasionally showing a cart, wagon, or pair of wheels,[88] make it evident that carts were not common.

In two parts of the colony carts and wagons seem to have been more plentiful than in the rest,—the northern part of the Eastern Shore, and the far west. In both these regions road petitions make constant reference to cart and wagon roads, and transportation by these means is frequently mentioned. As early as 1729 John Carnan advertised that he kept "Carts and Horses, for carrying Goods by Land between the Two Bays of Del. and Ches., that is, between Apoquinonny and Bohemia Landings."[89] By 1760 it was apparently not uncommon for men to peddle such supplies as butter over a large part of the Eastern Shore.[90] The extensive use of wagons in western Maryland is very well attested. Goods were regularly hauled to and from Baltimore by people living as far west as the Monocacy and beyond.[91] Wagon roads to Baltimore were the most im-

[87] Frederick County, Court Records, March, 1750, Liber C, p. 296. Braddock was informed that fifteen hundred "Carrying horses" could be provided from the Frederick region (Sargent, p. 288).

[88] A wagon "completely ironed" is mentioned in a bill of sale in Kent County (Bills of Sale and Mortgages, 1757, Liber A, p. 143). Such notices as this are occasionally seen.

[89] Maryland Gazette, June 10, 1729; Callister MSS., June 28, 1763.

[90] "If any butter monger should come to G. town [Georgetown, Kent County] whos a quantity of both tub and pot butter, I shall take it as a favour that you get some good woman to chuse for me 60 or 80^{l} of pot fresh butter & 200^{l} of salt d^{o}. and I will pay him the price you agree with him to deliver it to me here; which perhaps may be in his way to Talbot, or not much out of his way if he goes with the rest to Newton" (Callister MSS., October 16, 1762).

[91] "We have sent Mr. Wolgamots Wagon for the Goods mentioned in the Enclos'd Invoyce" (Shelby, of Frederick, to Hughes, of Baltimore, in Chancery Record, Liber DD No. 2, p. 334).

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portant part of the road system in this region. The best proof of the wide-spread use of wagons in the western county is the well-known instance of the procuring by Franklin and others[92] of hundreds of wagons to transport the Braddock Expedition. These two regions—the first with greater opportunities and the second under severer necessities—outstripped the other parts of the colony in methods of transportation, and were making wide use of wheeled vehicles for hauling at a time when a farm wagon or even a cart was exceptional in the other counties.[93]

The history of the transportation of persons is somewhat different from that of goods. The most primitive and, until very recent years, the most effective way of transporting persons, for long distances or short, was on horseback. Every colonial traveler who has left us an account of Maryland came into the colony either by sea or on horseback. It was the only method of long-distance land travel, for stage coaches had not yet begun to run.

For traveling short distances, coaches, chaises, and chairs (two-wheeled gigs) were very common. It is impossible to tell when these luxuries were first introduced, but it is probable that they were not numerous before the fourth or fifth decade of the eighteenth century. In 1732 John Stokes of Baltimore County had two carts with broken wheels and a chariot valued at £45.[94] After about the middle of the century notices of carriages of one kind or another are more frequent, especially in the northern part of the Eastern Shore, where the level country made fairly good roads pos-

[92] Sargent, pp. 288, 308. Many of these came from Pennsylvania, but there were practically no economic differences between western Pennsylvania and western Maryland.

[93] The following are some references to other counties: Maryland Gazette, October 5, 1752, contains the advertisement of a carter in Annapolis, and speaks of competition in the business. A bill for carting in Charles County is to be found in Court Records, March, 1725/6, Liber P No. 2, binding no. 35, p. 203. A road passable for rolling or carting is mentioned in Court Records, Baltimore County, November, 1729, Liber HWS No. 6, p. 312.

[94] Inventories, 1732, Liber D 4, p. 441.

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sible. Wagon and chaise makers are sometimes found.[95] In Queen Anne's County in 1747 there was advertised for hire a two-wheeled chair, a horse, and a driver, convenient for traveling between Chestertown, Kent Island, and Talbot court-house.[96] Carriages were sufficiently numerous in 1754 to constitute a convenient taxable article, and among the imposts laid for the sinking of £6000 of paper money issued for war expenses was five shillings currency per wheel on all coaches, chairs, and chaises.[97] Returns from this tax between February, 1758, and November, 1762, amounted to £726. 7s. 5d.[98] Making some allowance for collector's commissions, and estimating two two-wheeled chairs to each four-wheeled vehicle, it is seen that this tax represents about three hundred vehicles of all sorts. This estimate is probably low, for it is not conceivable that the tax lists were exhaustive, and it is very probable that the two-wheeled vehicles were in a much larger proportion. Probably about four hundred is a fair estimate of the number of carriages of all sorts in use at that time by the one hundred and fifty thousand inhabitants.

An important adjunct to the road system was the means of entertaining travelers. Maryland was not inhospitable to visitors if hospitality may be judged by the number of houses of public entertainment, or ordinaries. The license reports for 1746 show 845 licensed ordinaries in the colony.[99]

[95] Maryland Gazette, November 18, 1756; Kent County, Court Records, March, 1758, Liber JS No. 23, p. 188. The value of a riding chair is placed at £22.

[96] Maryland Gazette, June 23, 1747.

[97] Bacon, 1754, ch. 9. Coachmen and footmen are occasionally mentioned (C. M. Andrews, Guide to the Materials for American History, to 1783, in the Public Record Office of Great Britain, vol. ii, pp. 322, 323).

[98] Lower House Journal, April 24, 1762.

[99] The list of counties is as follows:—

Prince George's	164	Calvert	22	Somerset	35
Anne Arundel	91	St. Mary's	27	Worcester	20
Queen Anne's	61	Charles	79	Kent	59
Dorchester	27	Talbot	31	Baltimore	130
Cecil	99				

—Upper House Journal, March 27, 1746.

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The report of the year before showed 58 in the city of Annapolis.[100]

This large number of taverns is to be accounted for in several ways. The legitimate business of entertaining the traveling public could not have been very large, but in a thinly populated country, hospitality to the stranger is a prime necessity, and tradition ruled that nobody should be turned away from one's door. As the law forbade the sale of food and drink without a license, any household that wished protection from the drain of a somewhat enforced hospitality was compelled to take out a license as a regular ordinary. Petitions for licenses on these grounds are very frequent.[101] A typical request of this kind says "that your Worships petitioner hath for some Years past and still is by reason of his living on two publick roads very much opressed by Travellers particularly by divers persons driving large droves of Cattle to the great detriment of your petitioner & trouble of his family w^{ch} grievance cannot be remedyed otherwise than by your petitioners keeping House of publick Entertainment."[102] In some instances, however, the taking out of a license for an ordinary was not an act of unwelcome necessity. Ordinary-keeping was at times a paying business, and locations much frequented by travelers were in demand for this purpose.[103]

The most valuable part of the ordinary's trade was not the accommodation of travelers, but the satisfaction of the local appetite for strong drink. It was at the ordinary that the country-side gathered for its revels. Hamilton tells of seeing "a drunken Club dismissing" at Tradaway's inn near

[100] Lower House Journal, August 16, 1745.

[101] Baltimore County, Court Records, August and November, 1721, Liber JS No. C, pp. 549, 621; Cecil County, Petition Book, November, 1724, p. 68; June, 1727, p. 111; November, 1731, p. 174; Queen Anne's County, Court Records, November, 1735; November, 1736, passim.

[102] Queen Anne's County, Court Records, June, 1739, Liber 1735–1739.

[103] Henry Callister, in offering his land for sale, says that it is a location fit for a merchant, innkeeper, or ferryman (Callister MSS., 1763).

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Joppa. The landlord "made that trite apology,—That indeed he did not care to have such disorderly fellows come about his house; . . . but these were country people, his neighbours, and it was not prudent to disoblige them upon slight occasions."[104] Herein lay the profit in the business.

Persistent attempts were made to regulate taverns by law.[105] In 1717 an act was passed for this purpose, but of its provisions very little is known.[106] From the county court records it is evident that a license tax of five hundred pounds of tobacco was laid, that a bond of £20 sterling was required to guarantee that no dissolute person would be entertained (unless such person was capable of giving a vote for the delegates to the Lower House), and that the justices were enabled to set the prices for the various kinds of food, drink, and entertainment.[107] This act expired in 1729, and another law for the same purpose was passed in 1735 and ran until 1739. In this act also a license fee was levied, which was granted to the proprietor,[108] but when the time came for renewal in 1739, the Lower House disputed the right of the proprietor to these revenues, and though the governor threatened to reject all bills that had been passed that session, the house stood firm.[109] During the next year ordinaries were entirely without regulation.

In 1740 the expedition to the West Indies gave the Lower House an opportunity to defeat the proprietor's claim to the license money from ordinaries by appropriating the money in a way which the governor dared not reject. After a controversy between the two houses,[110] an act was passed

[104] Hamilton's Itinerarium, p. 5.

[105] They had been regulated before 1689, and a license imposed before that date had proved a great bone of contention during the royal government.

[106] Bacon, 1717, ch. 1. The volume of laws, LL No. 4, covering this period is lost.

[107] Kent County, Court Records, August, 1724, Liber JS No. AB, p. 213; November, 1724, Liber JS No. AD, p. 46; Baltimore County, Court Records, August, 1719, Liber JS No. C, p. 230; Queen Anne's County, Court Records, March, 1718/9.

[108] Bacon, 1735, ch. 8.

[109] Lower House Journal, June 8, 9, 1739.

[110] Ibid., July 16, 17, 1740.

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by which a license tax of £5 currency was laid on all ordinaries in Annapolis, and fifty shillings currency on all in the counties. These revenues, with others, were appropriated to the sinking fund for the expenses of the West India expedition. A full code of regulations was included in the act. The county courts, as usual, were permitted to draw up a schedule of tariffs, a copy of which must be posted in each ordinary.[111] In the county seats ordinaries were required to have at least four beds and stabling for ten horses, and in other places, two beds and stabling for six horses. Keepers were excluded from public office, and were required to give bond for £40 currency as a guarantee that they would not permit tippling and gaming. Servants were not to be entertained without the consent of their masters, and sailors and persons with families and no estates were not to be trusted for anything except necessary victuals and drink.[112] After the expiration of this act, it was in all essential points continued by an act of 1746, which in turn was continued in 1754 and 1756, but expired in 1763.[113] During all these continuations the revenue from licenses was

[111] The following is a copy of such a schedule:—

	s.	d.
Hot meal with pint of small beer or cider....	1	3
Cold meal with pint of small beer or cider....	1	0
Lodging	0	6
Canary wine per qt.	6	0
Port wine per qt.	5	0
Madeira wine per qt.	3	0
Horse pasturage	0	6
Corn or oats per peck.....	1	6
Stablage with hay or fodder.....	0	6
Rum per qt.	3	0

—Baltimore County, Court Records, November, 1742, Liber TB No. D, p. 65.

[112] Acts of July, 1740, p. 1. The last provision runs as follows: "Whereas it is a general Complaint throughout this Province, that Ordinary-keepers have made it their constant practice to entertain Tradesmen and other Persons having Families, and no other Means of Supporting them but their own Labour and Industry, and single disorderly Persons, Tippling and Gaming in their Houses, and wasting their Time and Substance, to the Ruin of their Families, and themselves, and the encouragement of Idleness, Drunkenness, and all other Irregularities and Disorders, be it enacted," and so on.

[113] Bacon, 1746, ch. 1; Acts of 1746, pp. 10–17.

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appropriated to some fund for provincial defense, which made it difficult for the governor or the Upper House to reject any of the bills.

The proprietor, however, did not surrender his claim to the right to license ordinaries and to receive the revenues therefrom. When Frederick, Lord Baltimore, came into possession, he attempted to assert this claim along with several others, and granted the proceeds from these licenses to his uncle, Cecilius Calvert, as part payment of his salary as secretary.[114] Governor Sharpe was instructed to issue these licenses and collect the fees, but he found it impossible to obey as long as the act of 1746 was in force.[115] He took up the fight in 1754 and 1755, when the subject again came before the assembly, but his council was weakening in its support of the proprietor's claim, and on its advice Sharpe ignored his instructions and passed the act of 1754. In 1755, however, with peremptory orders from the proprietor, the governor became stricter, and allowed the appropriations for war expenses to fail entirely because the Lower House insisted on mortgaging these licenses still further.[116] For five successive sessions the assembly was at a dead-lock over this matter, and the colony was left without any provision for defense. This state of affairs could not continue long, and in 1756 the proprietor was forced to give way and permit Sharpe to pass the act of that year, which mortgaged the licenses until an appropriation of £40,000 then made should be entirely refunded.[117]

Even this defeat did not settle the controversy, for in 1763, after the expiration of all the acts appropriating the license money, the battle was renewed. In that year a movement was started to appropriate this money to the maintenance of a military force on the western border. This seems to have given place to an attempt to use the money for the

[114] Lower House Journal, July 7, 1755.
[115] Archives, vol. vi, p. 12.
[116] Lower House Journal, March 26, 1755; Archives, vol. vi, pp. 235, 236.
[117] Archives, vol. vi, p. 424.

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support of a college. A bill for this latter purpose was favored by the council, but was rejected by the proprietor.[118] Notwithstanding the opposition of almost every one in the colony,[119] in 1765 the proprietor again instructed the governor to insist upon the claim. In 1766 the members of the council were themselves so strongly opposed to the proprietor[120] that he was finally induced to yield, and from this time on ordinaries were peacefully regulated by the assembly.

Consideration has been given thus far only to methods of travel and trade by land, but a large part of the traffic in Maryland was by water. No one unfamiliar with the magnificent rivers and bays of this region can appreciate the wonderful facilities for transportation by water, and no one who has not had personal experience of the canoes,[121] bateaux, and larger vessels in use today in Maryland is in a position to picture the amphibious life of the colonist. The streams in colonial times were navigable much farther up than they are today. Almost every up-stream community at the present time has its tradition that large ships once came up to some neighboring mud-hole now scarcely navigable by a skiff. Bladensburg and Elk Ridge boasted of their sea-going shipping, and even Beall Town, far up the

[118] Archives, vol. xiv, pp. 152, 175, 193; Calvert Papers, No. 2, pp. 252, 255.

[119] Calvert Papers, No. 2, pp. 239, 240. Sharpe wrote to Secretary Calvert in 1763: "Since I am on this Subject which will probably be a Fund of much Contention at future Sessions I think it my Duty to observe to you that upon my saying one Day when the last mentioned Bill was on the Carpet that His Lordship conceived he had a Right to a Fine on granting Ordinary Lycenses Mr Dulany declared that for his part he had no Idea of a Right without a Remedy & that he could not see how His Ldp could support any Claim or Pretentions to such an Emolument, Such being the Doctrine which is generally received in the Province there is not I am afraid any great probability of the questions being speedily determined here in a manner advantageous to either His Lordship or yourself, but you may depend on my adhering to that matter" (Archives, vol. xiv, pp. 125, 126).

[120] Archives, vol. xxxii, pp. 143–147.

[121] The Chesapeake canoe is a boat dug out of one or more logs. Often as many as five or six logs are fitted together, making a boat from twenty to fifty feet long and from five to ten feet wide.

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East Branch of the Potomac, considered itself on navigable waters.[122]

On the most frequented courses of travel sailing ferries and regular establishments for hiring boats were maintained. As early as 1729 John Carnan kept at Bohemia Landing, where travelers from Philadelphia first reached Chesapeake waters, not only carts and horses to bring goods across the portage, but also a sloop and hands to transport goods and passengers to any part of Maryland or Virginia.[123] In 1746 two ferries were in operation between Annapolis and Kent Island, one of which advertised as rates ten shillings for a passenger and horse or two passengers and seven shillings six pence for a single passenger.[124] In 1761 there was advertised a scheme for running a decked boat weekly between Annapolis and Oxford. All persons subscribing thirty shillings a year toward the enterprise were to have free passage, but must find their own food.[125] Sailing ferries were also maintained over the Potomac, and in addition to these public water conveyances, there were thousands of privately owned canoes, sloops, and bateaux, in which the people moved up and down the watercourses just as freely as inland people moved along the roads.

Henry Callister's papers show a comparatively large volume of bay and river trade in wheat, flour, bran, and other goods.[126] It is probable, however, that there was more local trade in his community (Chester River) than in any other part of the province. In collecting the cargoes of the larger sea-going vessels the small boats of the colony had a more active business than in purely local trade. In loading tobacco, especially, large ships anchored in the open roadsteads, and sloops, flats, and other small craft brought the

[122] Prince George's County, Court Records, August, 1738, Liber X, p. 109.
[123] Maryland Gazette, June 10, 1729.
[124] Ibid., June 24, December 9, 1746.
[125] Ibid., April 2, 1761.
[126] Callister MSS., May 4, 1746; November 10, December 12, 1761. See also Baltimore County, Court Records, March, 1720/1, Liber JS No. C, p. 475.

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hogsheads from various landings for miles around.[127] In the southern part of the colony tobacco was at times sent across the bay in sloops to be transferred to some larger vessel, and in the north, ships regularly lay in the mouths of Back, Middle, and Bush Rivers and received tobacco from both sides of the bay.

In dispersing the cargo of an incoming vessel, the small boat was equally indispensable. Merchants with more than one store usually despatched their ships to their most important agency, and sent on the cargoes for their outlying stores by sloops.[128] In many cases shipmasters left small parcels of goods at the most convenient places to be sent for by the consignee.[129] Thus, Molleson wrote to Charles Ridgely in 1766 that certain goods that were too late for the Patapsco ships would be sent by some Eastern Shore ship that touched at Annapolis.[130] It was expected that Ridgely would have a small boat go down to Annapolis for them.

If the water was a bond of union between the inhabitants of the colony, it was no less a door of ready access for England. "Every river and creek are harbours, and most people have landing-places at their plantations," wrote Governor Nicholson.[131] He intended to imply that these harbors and landing-places were used by sea-going vessels. In fact, trade with England was directly from the plantation landing to the London dock. Ships from abroad came not only to a distant port, but right to a planter's landing, and spent four or five months each year anchored probably in sight of his house.

Communication by water, though very direct and convenient, was attended by many perils. The dangers of the sea were much greater at that time than in this day of im-

[127] Jones, p. 55; Dulany Papers, box 1, No. 83; Callister MSS., November 12, 1745; July 9, 1751.

[128] Ridgely Papers, July 10, 13, 1761; June 4, 23, 1764; Callister MSS., August, 1748.

[129] Callister MSS., May 13, 1759; July 2, 1761; Maryland Gazette, July 26, 1745; April 8, 1746; February 8, 1759.

[130] Ridgely Papers, 1766.

[131] Calendar of State Papers, Colonial Series, America and West Indies, 1696–1697, p. 421.

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proved shipbuilding, and aids to navigation were entirely wanting. No sea-going captain can be expected to know all the harbors that he touches, and local pilots are often necessary. In 1734 Henry Ward, then agent, was instructed to license pilots for Maryland,[182] and a few such permits were issued. The proprietor, however, refused to prosecute persons piloting without licenses, and the whole system failed. In 1754 the plan was revived, but its hopelessness was shown by Governor Sharpe's suggestion that the merchants be persuaded to order their captains to employ none but licensed men. In 1754, as in 1734 and 1735, no success was had with the licensing plan, and the idea seems to have been entirely abandoned.[183] That individuals followed the business is seen by the advertisement of Richard Bryan, wherein he offers to pilot from Annapolis to the Patapsco for £3, to the Susquehanna for £5, and to Cape Henry for seven pistoles.[184]

Another protection to navigation that was lacking in colonial Maryland was a system of buoys and lighthouses. The province never took any steps whatever toward the marking of channels. In 1721 Virginia suggested that the two colonies erect a lighthouse at Cape Henry, and asked the Maryland assembly to contribute £150 sterling toward the building and £80 sterling per year for its maintenance. The Lower House refused to agree to the plan, partly because it was uncertain about the proportion of the cost that Maryland would be paying, and partly because it was doubtful of the real value of such a light to the shipping.[185] The suggestion was renewed by Virginia in 1728[186] and again in 1756,[187] but no action was taken. In 1752 Virginia proceeded to act alone, and levied a tonnage duty on all ships entering and leaving the Chesapeake. The act was disallowed by the Privy Council on the grounds that it was indefinite as to

[182] Calvert Papers, MS., No. 295½, p. 65.
[183] Archives, vol. vi, pp. 92, 408; Calvert Papers, No. 2, p. 180.
[184] Maryland Gazette, April 17, 1755.
[185] Upper House Journal, July 19, 1721.
[186] Ibid., October 4, 1728; Board of Trade Journal, vol. xxxviii (Public Record Office, C. O. 391: 37), p. 270.
[187] Archives, vol. vi, p. 509.

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the cost of the light, that it was a burden on British shipping, and that it was an unjust tax on Maryland ships.[138] It was not until after the close of the period under discussion that vessels entering the capes were given this needed protection.

Maryland's waterways required a certain amount of care and safeguarding, which the assembly in a small way was willing to grant. Many vessels entered in ballast, and the captains were accustomed to throw their ballast overboard after anchoring in a safe harbor. This dumping of large quantities of stone into the best harbors of the colony tended to fill them up and ruin them for the larger ships. An act of 1704 made it illegal to throw ballast into the rivers or bays below high-water mark.[139] This required that stone should be carried ashore,—a burdensome task,— and as there was no penalty provided for masters the rule was seldom obeyed. A new act passed in 1735 provided that no ballast should be thrown overboard at night and none should be thrown into the bay above Cedar Point or into any river below low-water mark. A penalty of £50 currency was to be paid by any shipmaster who infringed the law. This act seems to have met the conditions, for it was several times renewed, and finally made perpetual.[140]

Another difficulty in the maintenance of the waterways was caused by the natural filling up of many of the smaller streams. This process is well pictured in a petition of the inhabitants around Beall Town on the Eastern Branch of the Potomac, which "Sheweth that the Feshes [Freshets] have Brought Down Trees & Trash which is Lodged in & Choak'd up the Channell in the Said Branch so that Boats & other Craft Cannot be Brought up to Lade or Relade goods at the usuall Landing place."[141] This and possibly many

[138] Acts of Privy Council, Col., vol. iv, p. 401.

[139] Bacon, 1704, ch. 90; Parks, p. 45.

[140] Bacon, 1735, ch. 16. In 1753 an act was passed to prevent the iron works along the Patapsco from throwing dirt into the river so that it could wash down into the channel (ibid., 1753, ch. 27).

[141] Prince George's County, Court Records, August, 1738, Liber X, p. 109.

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other similar cases were attended to by the counties. The assembly, on the other hand, was called upon to keep clear the upper Potomac, the Monocacy, and the Conococheague.[142] Late in the colonial period there was a movement on foot to open up the Potomac to navigation around the Great Falls and other obstructions.[143] This movement was taken up by the famous Ohio Company, but no solution of the problem was reached until the construction of the Chesapeake and Ohio Canal. During the period under consideration the opening of the upper Patuxent was of greater interest to the assembly than that of the upper Potomac. The people of Anne Arundel and Prince George's Counties began the movement to open the river for about twenty miles above Queen Anne Town, and petitioned the assembly to give them sufficient power and protection in the enterprise. By an act of 1733 it was made lawful for the residents to raise a subscription for the purpose, and it was made unlawful to obstruct the river by weirs or by the felling of trees into it. The petitioners were required to begin work within six months.[144] The river was probably opened by this body of people, for in 1736 the Patuxent Iron Company was granted permission to clear a tow-path on the banks of the river.[145] The western branch of the Patuxent leading to Upper Marlboro showed the same tendency to fill up, and in 1759 a lottery was drawn to raise funds to clear the river and build a wharf at Upper Marlboro.[146] All these waters are now mere babbling streams dignified by the name river only out of courtesy to the breadth of their lower reaches.

One might conclude that with such a wealth of means of travel and communication Maryland would be the most closely integrated colony in America, but it must be remembered that the same stream that forms the finest of highways for the canoe is prohibitive to the horse, and the

[142] Lower House Journal, March 25, 1765.
[143] Eddis, p. 5; B. Sollers, "Jonathan Hagar," in German Historical Society, Report 2, p. 20.
[144] Bacon, 1733, ch. 9.
[145] Ibid., 1736, ch. 15.
[146] Maryland Gazette, May 31, 1759.

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smoothest of roads is of no use to the man in a bateau. In other words, as long as a traveler could make use of a single mode of travel he would fare well enough in Maryland, but there were great difficulties in changing from one mode to another. Thus, the people all along the shores of a river would meet with each other by boat and the people living on a single body of land would meet through land travel, but an inhabitant living a little back from the water on one peninsula, or neck of land, rarely ever saw an inhabitant of another neck. Maryland is so cut up by the estuaries of the Chesapeake that the various necks are small, and it follows that the communities in which there was close intercourse were necessarily not large. Local travel, in other words, was much hindered by the alternation of land and water.

Intercolonial travel was not affected by this condition. Along the three great highways that have been pointed out a few people were constantly moving. The greatest stream of travelers came across from Philadelphia, around the head of the bay, down to Annapolis, and across to Virginia.[147] A much smaller stream came down the eastern side of the bay, some travelers going on across into the Eastern Shore of Virginia. A goodly number, mostly Germans and many of them settlers, passed from Pennsylvania into Virginia through the Monocacy and Antietam Valleys and Harper's Ferry. Almost all the travelers who have left us accounts of their visits passed along one or the other of these highways. It would be interesting to know how many persons traveled any one of these routes, but even a guess is impossible. In Cecil County two of the routes met, and in the records of that region travelers are often spoken of. Many of them, however, were probably not going further than Philadelphia. Hamilton in this part of his journey found three road-companions.[148] An intercolonial journey could not have been a very serious matter, for in pursuit of a runaway thief Callister sent a messenger two or three

[147] The Vade Mecum for America gives a table of places and distances on this route (p. 203).
[148] P. 13.

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hundred miles toward Charleston, South Carolina,[149] and trips to distant colonies, such as that by Hamilton, were sometimes undertaken for very slight reasons. Traveling preachers wandered far and wide over the continent, and business men would cross several colonies to arrange a deal or collect a bill.[150]

Considerable interest attaches to the time required for these journeys. Hamilton, in good weather, traveled from Annapolis to Philadelphia in eight days, but certainly two and possibly three of these days were unnecessary. He spent three on the road to New York, and five more in going to Albany. This would make Philadelphia five or six days from Annapolis, and New York eight or nine. On the return trip he traveled ten days altogether between New York and Annapolis. This must be considered fast travel, for in Rhode Island he met a commercial traveler who had spent sixteen days on the road from Joppa, Maryland, a full day north of Annapolis.[151] This man's time from Annapolis to New York would be about eleven or twelve days. William Gregory in 1765 took four days to cross Maryland from the Potomac ferry to Castine Bridge, near New Castle, Delaware. On his return he crossed from Delaware to Alexandria by way of the Rock Hall-Annapolis ferry in three days. It was a full day of hard travel from Annapolis to Alexandria.[152] In 1760 there was a race on horseback between Frederick and Annapolis, the distance of seventy-five or eighty miles being covered in exactly eleven hours. This, of course, was the fastest possible time.[153]

Travel between Maryland and England was in various ways more comfortable than that between the colonies. In many instances the traveler could embark at his own plantation, and with more or less comfort sail directly for the mother-country. There were always in the colony many persons who had just arrived from abroad. Almost everybody

[149] Callister MSS., July 17, 1762.
[150] Hamilton's Itinerarium, p. 193; Clark Letter-book.
[151] P. 193.
[152] "William Gregory's Journal," pp. 226–229.
[153] Maryland Gazette, August 14, 1760.

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numbered among his personal friends some sailor, shipmaster, or merchant who was constantly making the trip, and a great many Marylanders went "home" themselves. The cost of passage across was only from £2 to £6,[154] the passengers providing their own food.[155] With the steady inflow of new immigrants, the constant moving back and forth of the professional sailors and merchants, and not a few planters crossing the ocean, intercourse between Maryland and England was nearly continuous.

Where there is much travel, means of communication are naturally abundant. Between Maryland and England, therefore, connections were direct, though not always swift. The tobacco ships sailed in the summer and fall, and one might have much trouble in sending a letter in the winter or early spring. At these times mail matter had to go by way of Philadelphia or New York.[156] At all other times communication with the mother-country both by letter and by word of mouth was free and sure. The planter saw his London merchant, or his responsible representative from home, every year. The time of passage was only about six or eight weeks,[157] and at least once a year, usually oftener, the Maryland planter had London news more direct than did some of the country gentlemen of England itself, and almost as fresh. Even the news-letter, so familiar in England at this time, was not unknown in Maryland.[158] It is a well-known fact that communication with England was much closer than with some of the other colonies, news

[154] Somerset County, Court Records, June, 1733, Liber GY, p. 21; Provincial Court Record, October, 1734, Liber EI No. 1, Binding No. 26, p. 185; Kent County, Court Records, March, 1743, Liber JS No. 30, p. 317. The total cost of a passage with board charged against one Frances Allen in 1738 was £6 sterling (Baltimore County, Court Records, August, 1738, Liber HWS No. JA 2, p. 269).

[155] An article in the Maryland Gazette (August 11, 1747) gives an account of expenditures for cabin stores of eight passengers from London to Maryland. They amounted to £8. 8s. apiece.

[156] Callister MSS., March 14, 1760.

[157] Maryland Gazette, May 10, September 27, 1745.

[158] Alexander Hamilton, while visiting a friend in Joppa, was shown an English letter "written in a gazette style, which seemed to be an abridgment of the political history of the times and a dissection of the machinations of the French, in their late designs upon Great Britain" (Hamilton's Itinerarium, p. 3).

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often reaching England before it did one of the neighboring provinces.[159] The directness of the intercourse with England enabled many colonists not only to buy from "home" in a wholesale way, but also to do much of their petty shopping in the London stores.[160] Almost every departing captain went away loaded down with personal commissions to make little purchases for friends in Maryland, and returned with numerous small parcels to be delivered to various individuals on this side.[161] Maryland ladies even had London shopkeepers file away their stay, dress, and shoe patterns, that they might be sure of a fit.[162] Henry Callister while at Oxford was able to send small mementoes to his friends in England by captains returning from the colony.[163]

Communication within the colony was not always so easy. Before 1713 official despatches were often brought to their destination in the colony only by the officers' impressing the horses of the inhabitants. In that year an act was passed making it a part of the sheriff's duty to forward all official letters through his county, for which he was paid in the county levy.[164] This act remained in force until the close of the colonial period, and the arrangement constituted a sort of official postal service.

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[159] Callister MSS., February 16, 1746/7.

[160] Henry Callister ordered in 1749 some London ale, one barrel of potatoes, one tierce of beef, coral and bells, Jeffries' four-sheet map of North America, Pope's Works, and so on (Callister MSS., November 12, 1749). Many accounts between planter and merchant show the same. Callister and his neighbors also imported books every year (ibid., September 20, 1762).

[161] See advertisements of such parcels for persons whom the captain could not find, in Maryland Gazette, July 26, 1745; February 8, 1759.

[162] "Mrs. Ridgelys Shoes are made by the pattern Shoe I brought home with me, which hangs up in my Closet on purpose always to fit her" (Ridgely Papers, November 8, 1766). Callister ordered Anthony Bacon to send Mrs. Callister "a handsome rich silk made up for her (you know her size) full dress suit, girdle & buckle" (Callister MSS., October 15, 1750).

[163] Callister MSS., August, 1748.

[164] Bacon, 1713, ch. 2. Officials themselves seem to have continued to practice impressing. In 1720 there was a complaint against two men who impressed ferrymen to put them across the bay and then received an allowance for traveling expenses (Lower House Journal, April 13, 1720).

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Private persons were not favored with postal facilities until many years later. In the meantime the public depended for the delivery of letters largely upon the friendly offices of any well-disposed individual. One's friends and acquaintances who happened to be making a journey were in the earlier times the chief dependence as disseminators of news and carriers of letters. Hamilton speaks of receiving commissions to deliver to his friends,[165] and Callister not only sent letters by friends, but also requested that his correspondents should forward letters still farther.[166] Even a stranger might be asked to do such favors. Callister wrote in one letter, "I know not by whom this will be handed you; it waits for the first traveller of a good aspect."[167] Business was transacted through messages carried by friends,[168] and even money payments would sometimes be left in the hands of third parties to be delivered to the owner.[169]

More dependable ways were of course found for important communications or for those that could not await a chance opportunity. Private messengers might always be sent, and were made much use of.[170] The demand for messengers was sufficient for one man to advertise in the Maryland Gazette in 1746 that he stood ready to serve "as reasonably as any one" those who had "occasion to send a Messenger to any Distant Part of this, or to any of the Neighboring Governments."[171] In 1745 an advertisement stated that a team would go every week from Charlotte Town to Patapsco, and that a letter might be sent for four pence and a package under two pounds in weight for six pence. It was further proposed that in the spring of 1746 a caravan should be established between these places and

[165] Pp. 236, 238.
[166] Callister MSS., March 14, 1760; September 20, 1761.
[167] Ibid., November 3, 1761.
[168] Ibid., July 2, 1761.
[169] Ridgely Papers, August 15, 1765.
[170] "Moravian Diaries of Travels Through Virginia: Extracts from the Diary of Leonhard Schnell and John Brandmueller," in Virginia Magazine of History, vol. xi, p. 118; Ridgely Papers, June 23, 1764.
[171] February 4, 1746.

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York, Lancaster, and Philadelphia, " for the conveniency of Passengers, Goods, Letters, etc."[172] This was a common carrier of a very advanced type. An extension of the special messenger plan was the regular rider, who was usually supported by subscriptions. Various persons would contribute a certain amount each year to maintain a rider, who would make the trip between given points at stated intervals. The subscribers had the right to send letters without further cost. A scheme was launched in 1756 for establishing riders on the Western Shore " from one Court-House to another, once a Week, by which Means a Weekly Correspondence may be carried on between *Annapolis* and those Places."[173] The plan was probably successful, for in 1759 notice was given to the supporters of the rider from Annapolis to St. Mary's court-house that the time of their subscriptions had expired, but that the rider would be continued in the belief that the subscription list would be made up.[174] Such riders were maintained not only within Maryland, but also between that and other colonies.[175]

Side by side with these private posts was maintained the government post. In 1710 the British government first organized a postal system, but it seems not to have embraced Maryland until 1728. On May 9 of that year the Weekly Mercury of Philadelphia announced the setting out of the Maryland post to perform his stage once a fortnight. The offices for receiving and delivering letters were to be at Andrew Bradford's in Philadelphia, James Sykes's in New Castle, and William Parks's in Annapolis. With the extension of this system southward a thread of communication was established straight across the colony, following the main road from New Castle to Susquehanna, Joppa, Balti-

[172] Maryland Gazette, October 18, 1745.

[173] Ibid., February 12, 1756.

[174] Ibid., December 20, 1759. A similar plan for running a decked boat weekly between Annapolis and Oxford has already been noticed (above, page 153).

[175] Callister to Morris, of Philadelphia: "It will reach your hands without any charge, as I am a subscriber to this Rider: but I apprehend the rest of the journey [to New York] will be attended with some Cost" (Callister MSS., September 20, 1761).

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more, Annapolis, Alexandria, and the South. No lateral extensions of this system were made during the period under discussion, though in 1764 Governor Sharpe was of the opinion that it would pay to establish an office in each of the fourteen counties.[176] Communication was improved at the other end by the establishment in 1756 of a system of packets between Falmouth and the colonies. Mail left Annapolis for the New York packet on the second Saturday of every month. The rates for letters were one shilling per sheet or four shillings per ounce.[177]

The arrival and departure of the carriers seem to have been fairly regular. In 1744, to be sure, Henry Callister wrote, "Our Posts are not regular, & other opportunities [for sending letters] are less frequent," but Callister was then living far from the postal route, and the irregularity may have been between Annapolis and Oxford.[178] By 1761 a weekly service had been established in the summer time, the carriers meeting at Annapolis to exchange mail for the North and the South. The time of meeting was at first on Wednesday, later on Sunday afternoon.[179] Such a definitely appointed meeting time would not have been probable without considerable actual regularity. Late in November each year the winter schedule of fortnightly trips was begun, and news became scarce in the province.[180] In the depth

[176] "The only Offices which are at present established in this Province for the Reception of Letters are on the main Road which leads thro this place between Philadelphia & Virginia, but I am inclined to think that if a Post Office was to be opened at some Central Place in each of the fourteen Counties into which this Province is divided & proper measures taken for the Conveyance of Letters hither from such Offices & hence thither every week the Revenue of the Post Office would after some time be thereby increased & Letters would be conveyed in a very few Days from one End of the Province to the other" (Archives, vol. xiv, pp. 180, 181).

[177] Maryland Gazette, February 12, 1756; Plantations General, vol. xv (Public Record Office, C. O. 323: 13), O 130.

[178] Callister MSS., November 25, 1744. It is possible that by "Posts" he meant private carriers; but this is not probable, as these were usually called "riders."

[179] Maryland Gazette, July 2, 1761.

[180] The Maryland Gazette complained of the dearth of news, and invited contributions at this time (November 26, 1761). Callister advertised in the Pennsylvania Gazette in alternate weeks, "as the papers come in by pairs" (Callister MSS., 1763).

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of winter conditions became worse, for communication was then frequently stopped by ice and snow. On December 31, 1761, the Gazette said that there had been no communication with the Eastern Shore for six days, that mail from the North was a day overdue, and that there had been no mail from the South for four weeks. In Maryland this was early in the winter for delays to occur. Such irregularities as this, however, were negligible, and except for its narrow geographical limitation the colonial postal system seems to have been fairly efficient.[181]

Letters sent through the public post-office as well as private communications seem to have been forwarded to persons not directly on the route by any chance means that might offer. The taverns in particular were used as depositories for mail. From early times it was customary to leave letters and packages for persons at the nearest convenient tavern on the chance that the owner might happen to stop in or that some kindly disposed person would carry the packet on another stage of its journey. The act of 1713 referring to letters containing protested bills of exchange states that " for want of due Care of such Letters, in which the same are enclosed, no settled Post-Houses being appointed for the Reception of them, many times sundry evil-minded Persons find Occasion clandestinely to take such Letters out of the Public Houses, where they are generally left, and break open and conceal the same, to the great Detriment of sundry of the Inhabitants, Merchants, and Traders." Jonas Green complained that he had lost two hundred subscribers to the Maryland Gazette by the robbing of packets directed to him containing subscription money.[182] This probably refers to packets sent by private conveyance, but the public post forwarded letters in the same way and was

[181] The postmasters appear to have undertaken other affairs for patrons than the delivering of mail. Callister, in writing of a thief whom he had pursued toward Charleston, South Carolina, says, " I have now given the affair in charge to the Post Master " (Callister MSS., July 17, 1762).

[182] Maryland Gazette, May 3, 1753.

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doubtless subject to the same danger. Henry Callister wrote in 1760: "I have been mortified these two days by notice given me of a letter being seen at Geo^re Town (about 9 Miles off) directed to me with the postage marked on it. I sent to enquire ab^t it yesterday, and find it was deliver'd to somebody to be left at a certain place for me; I sent thither: but no letter to be found. So that it is not likely I shall hear from you till you write again."[183]

Though such a state of affairs in the post-office may seem crude to one accustomed to the system of today, it was a vast improvement on the conditions of 1720. At that time there were few subscription riders and no post-office. By 1765 there were weekly posts between the colonies and subscription riders to every county. This marks a progress in forty-five years almost as great as was seen in the course of the next century.

With this rapidly growing system of travel and communication, the question arises as to the ways in which news was disseminated. A very important means of spreading news was the public meeting. Assemblies of various sorts were common. The weekly church services gathered together the people of each community, and were of such importance that, as is well known, the church door was made use of as an advertising medium. The large annual gatherings of the Quakers brought together people from a far wider area. These meetings partook of the nature of a fair. The following is a description of such a gathering in 1727: "The Yearly Meeting now came on, which held for four days, viz.: three for worship, and one for business. Many people resort to it, and transact a deal of trade one with another, so that it is a kind of market or change where the captains of ships and the planters meet and settle their affairs; and this draws abundance of people of the best rank to it."[184]

[183] Callister MSS., August 11, 1760.

[184] S. Bownas, Travels, quoted in J. S. Norris, "The Early Friends (or Quakers) in Maryland," p. 13, in Maryland Historical Society, Miscellaneous Publications, vol. ii. The Quakers complained to the assembly that they were disturbed in their worship at West River and Choptank by the setting up of booths and the sale of drink (Lower House Journal, October 12, 1725).

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Different in form but equally effective was the horse-race. This sport was always popular in Maryland, and the combination of a race and a fair so familiar today was common in colonial times.[185] Gregory, in traveling across Kent County in 1765, "came to a place where there was a fair and 2 horse races. Stayed there an hour; drank Punch and saw the diversion."[186]

The most important meetings from a commercial point of view were the county courts, which met four times a year in each county. Many people had to attend on legal business, and the entire county always made the court session a time of great social and business activity. That large numbers of people attended the courts is attested by the presence of petty dram and cake sellers, who not only diverted trade from the licensed ordinaries, but were also "the occasion of Tumults in retardacion of the Proceedings of the . . . Court."[187] Tobacco buyers and other dealers attended the county seats during court time, and moved from court to court in regular circuits.[188] At all of these meetings commercial and political matters were discussed, and the dispersing crowds carried news of all sorts to every part of the country-side.

During most of the period under discussion by far the most important means of disseminating news was the provincial newspaper, the Maryland Gazette. The first copy of this paper was published in Annapolis by William Parks

[185] "On Monday last was held on the North Side of Severn, for the first Time in the Memory of Man, A FAIR, where were Run several Horse Races, for sundry good Prizes; and a fine Smock was Run for, by certain Persons, who were not all of the Female Sex, which was won by a well legged Girl. The Day was concluded by two sumptuous Balls, at two several Places" (Maryland Gazette, June 14, 1753). See also many advertisements in ibid.

[186] "William Gregory's Journal," pp. 226–229.

[187] Charles County, Court Records, June, 1721, Liber K No. 2, binding no. 30, p. 133; Baltimore County, Court Records, August, 1719, Liber JS No. C, p. 229; see also advertisement "to atend at his Shop . . . at the time of all publick Courts and Assemblies" (Maryland Gazette, June 17, 1729).

[188] A charge in a ledger reads "pd. my Expenses to St. Marys, Charles, Calvert, & Prince George's County Courts" (Library of Congress, Firm Accounts, Maryland and Virginia, Journal, 1762).

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in September, 1727. It was a small four-page sheet carrying chiefly foreign news and advertisements, and its first period ran only until December, 1731. It was revived in December, 1732, and ran until December, 1734. In 1745 it was again revived by Jonas Green, the first copy appearing in April, and thereafter the paper continued without a break until 1810.[189] Both Parks and Green received aid from the assembly. In 1722 and 1723 the Lower House passed resolutions to aid a printer should one be found willing to settle at Annapolis, and in 1725 Thomas Bordley persuaded Parks to accept the offer.[190] By a resolution of the assembly Parks was allowed two thousand pounds of tobacco by each county for printing the laws and speeches of each session of the assembly. This resolution was later put in the form of an act,[191] which was continued until 1740.[192] In 1744 a similar law was passed allowing Jonas Green £15 currency from each county,[193] and in 1749 this allowance was raised to £20.[194] Further patronage of the same nature was extended in 1756 and 1762.[195] It was by means of these favors that Parks and Green were enabled to continue their work in Annapolis and to publish not only the laws, but also a number of small books and the Gazette.

The Maryland Gazette was a real force in the colony. Advertisements were plentiful, and though naturally Annapolis furnished most of them, all parts of the colony were represented, especially the west. The importance of the paper was shown by the part it played in public agitations for paper money and tobacco regulation.[196] Unfortunately

[189] C. Evans, American Bibliography.
[190] Upper House Journal, November 6, 1725; March 17, 23, 1725/6.
[191] Laws of Maryland, 1727, p. 13.
[192] Bacon, 1727, ch. 8.
[193] Acts of Assembly passed in May, 1744, p. 5.
[194] Acts of Assembly passed in May, 1749, p. 11.
[195] Acts of 1756; Bacon, 1762, ch. 24.
[196] On May 15, 1750, the Lower House entered the following resolution: "Ordered, That Mr. Green do print the Law for preventing the exporting of Trash or bad Tobacco, in his next News-Papers, and dispense them with the utmost Dispatch; that there may be an immediate Notification to all Persons, of that Law, in order for the due Observation of it."

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for us, local news was neglected in the interests of foreign despatches. Provincial affairs received most attention during the wars, when military movements were fully detailed. During the winter news was usually scarce and correspondence was invited.[197] This brought forth many letters and poems from local talent, and now and then a discussion of a public question. There is no information as to the amount of circulation enjoyed by the Gazette, but if we may accept literally Green's statement that robbing of the mails cost him two hundred subscribers, the total list must have been rather extensive to support such a loss.

The Philadelphia papers were of importance comparable with that of the Maryland Gazette as disseminators of news in Maryland. The American Weekly Mercury and the Pennsylvania Gazette both carried advertisements from Maryland, even after the establishment of the paper at Annapolis. In some instances these advertisements appear only in alternate issues, for the papers reached some parts of Maryland in pairs every second week.[198] These papers carried about the same kinds of matter as the Maryland Gazette, but gave somewhat fuller accounts of trade, prices, arrivals and departures, and such things. The importance of these journals to a business man in Maryland is attested by a letter written by Henry Callister in which he maintained that his subscriptions for the years immediately following 1745 should be paid by his employers, Cunliffe and Company, as the papers were necessary for his business at Wye.[199]

A summary of the changes which had taken place between 1720 and 1765 shows a remarkable advance in methods of transportation, travel, and communication. In that time the highway system had extended so that the road enumerations by the county courts in 1765 occupy more than twice as much space as those in 1720. All the roads back to the mountain valleys were constructed. Many new bridges and causeways were built. Hand in hand with these increasing

[197] Maryland Gazette, November 26, 1761.
[198] Callister MSS., 1763.
[199] Ibid., May 17, 1763.

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facilities for travel had gone a much wider use of wheeled vehicles, the development of a system of subscription riders, the establishment of a regular post-office, and, finally, the circulation of several newspapers. These were striking advances. In the years to come improvements were made in the systems already established in 1765, but no important changes came in methods of transportation and communication until the mechanical inventions of the next century brought in the steamboat, the railroad, and the telegraph.

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SERIES XXXIII NO. 2

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE
Under the Direction of the
Departments of History, Political Economy, and
Political Science

THE FINANCIAL ADMINISTRATION OF THE COLONY OF VIRGINIA

BY

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PREFACE

Throughout the colonial period the financial condition of Virginia was a subject of much concern to the British government, and especially to the English merchants, with whom the government cooperated. Commercial and economic success was the object sought by the merchants, and also by the government, which was endeavoring to perpetuate and to make more secure its control of the colony. The colonists themselves were quite naturally deeply interested in the financial system gradually worked out for them by the British government and the officials of the colony. There was a system of royal revenues, which were collected by officials holding royal commissions; these men were generally paid for their services out of those revenues, but in a few cases they were paid partly out of the British exchequer. There was also a system of provincial revenues, which were collected by officials holding commissions from the governor or from other local authorities. A study of the customs duties and other royal revenues, of the provincial revenues and the system of taxation, the various officials concerned with their collection and expenditure, and of the governmental expenses furnishes the information necessary for determining the efficiency of the financial system of the colony.

It was not until very late in the colonial period that the question of political rights was generally agitated. The colonists were desirous of remaining under Great Britain, and were satisfied as long as the commercial and financial policy of that government did not become oppressive. There was no objection to royal officials as such, for when the spirit of discontent did assert itself, the trouble could be usually traced to the effort of the British government to interfere with the economic and financial affairs of the colony.

This study of the financial system constitutes one of the chapters of a monograph on the Royal Government in Virginia, which it is my purpose to publish later.

P. S. F.

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THE FINANCIAL ADMINISTRATION OF THE COLONY OF VIRGINIA

Revenues and Taxation.—Three methods of raising money existed in the colony,—the duties on trade, the tax on land, and the poll tax. Thus the revenue system in Virginia was quite similar to that in England, where there were customs duties, land taxes, and poll taxes. When the control of the colony was changed from proprietary to royal in 1624, the customs duty on tobacco from Virginia paid in England by the importer was even then of much consequence.[1] There were really two duties on exported tobacco,—the two shillings per hogshead paid by the shipper in the colony, and the English customs paid by the importer in England. One of the chief sources of revenue in the colony was this duty of two shillings per hogshead on exported tobacco, first imposed in March, 1657/8, by the Assembly.[2] By 1680 the governor (Culpeper) had this duty made permanent, and instead of being accounted to the Assembly as formerly, it was to be considered a royal revenue.[3] It was appropriated for governmental expenses, being used for paying the salaries of the governor and other officials of the colony and for the usual contingent charges of the government, and was the

[1] In 1624 the annual revenue paid by the English importers into the royal treasury from the duty on tobacco was £90,000, while in 1674 it was £100,000. In 1624 tobacco commanded a higher price in England than in 1674, and the duty was higher also. These facts evidently account for the similarity in the amounts just mentioned, although more tobacco was raised and much more imported into England in 1674 (Calendar of State Papers, Colonial Series, 1669–1674, no. 1159; P. A. Bruce, Institutional History of Virginia in the Seventeenth Century, vol. ii, p. 590).

[2] W. W. Hening, Statutes at Large, vol. i, pp. 491, 523; vol. ii, p. 130.

[3] William Blathwayt's Journal, vol. i, p. 62.

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principal fund upon which the governor depended.[4] The amount realized from this revenue was £2500 in 1676, and by 1680 it was about £3000.[5] The cost of collection was twenty-seven per cent of the whole amount. There was only a very gradual increase in the net sum realized,[6] but by 1750 this revenue amounted to £5000, and by 1760 to £7000 annually.[7]

The castle duty, first imposed in February, 1631/2, of one pound of powder and one pound of shot on every ton of

[4] The Official Records of Robert Dinwiddie, vol. i, p. 353. Cited as Dinwiddie Papers. Colonial Office Papers, 5: 15, 585.

[5] William Blathwayt to Lords of Treasury, in Blathwayt's Journal, vol. i, p. 62. British Museum, Additional MSS., no. 30372, p. 46.

[6] Blathwayt's Journal, vol. ii, pp. 27, 29, 63, 147, 207, 291; vol. iii, p. 84.

RECEIVER-GENERAL'S ACCOUNT OF TWO SHILLINGS PER HOGSHEAD REVENUE

October 25, 1714–April 25, 1715

Receipts

£.	s.	d.
926	8	6¼

Disbursements

	£.	s.	d.
By balance of last account due Receiver-General	1070	9	11¼
Salary of Governor (six months)	1000		
Rent of Governor's house " "	75		
Salary of Council " "	175		
" " Auditor-General " "	50		
" " Solicitor of Virginia Affairs " "	50		
" " Attorney-General " "	20		
" " Clerk of Council " "	50		
" " Gunner at Jamestown " "	5		
" " Armorer " "	6		
Minister attending Assembly	10		
Contingent charges	38	7	6
Naval Officers 10% (£810. 2s. 2¾d.)	81		2½
Auditor 5% (£845. 8s. 3¾d.)	42	5	4¾
Receiver-General 5% " " ")	42	5	4¾
	2715	8	5½
	926	8	6¼
Excess of Expenditures	1788	19	11¼

This account was signed by the receiver-general, the auditor, and the governor (W. Blathwayt, Virginia Papers, MS.).

[7] C. O. 5: 216, 8; Dinwiddie Papers, vol. ii, p. 271.

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cargo imported, was lowered in 1633 to one fourth of a pound of each, and in 1645 was fixed at one half a pound of each. In 1662 it was raised to three pounds, but the master of the ship had the option of paying this duty in money at the rate of one shilling three pence on every ton of cargo. Before 1680 it was paid to the captain of the fort at Point Comfort as compensation for his services, but after that date it was appropriated to the support of the government.[8] It was then known as port duty.

Revenues were also derived from the fines and forfeitures imposed by act of Parliament or act of Assembly for breach of penal law, contempt of court, and conviction for felony or trespass; from a fee for the right of taking up land, which was five shillings for every fifty acres for which a grant was issued; and from a fee of two shillings per acre for escheated land. These revenues, including the duty of two shillings per hogshead on exported tobacco, were estimated by Governor Gooch about 1735 at £5000, by Governor Dinwiddie in 1755 at £6500, and by Governor Fauquier in 1763 at £7000 annually,[9] and were all appropriated to the support of the government.

In addition to the revenues already mentioned was the quit-rent. All land in the colony was claimed by the king, and those who held it were required to pay an annual rent to him of one shilling for every fifty acres.[10] The quit-rent, which was imposed in January, 1639/40, was at first not required to be paid until seven years after the grant had been obtained. As this ruling had a tendency to encourage the acquisition of more land than could be cultivated, the privi-

[8] Hening, vol. i, pp. 176, 192, 218, 247, 301, 312, 423; vol. ii, pp. 9, 134, 177, 466; vol. iii, pp. 345, 491; Virginia Magazine of History and Biography, vol. iii, p. 121; Dinwiddie Papers, vol. i, p. 389.

[9] Virginia Magazine of History and Biography, vol. iii, p. 121; Dinwiddie Papers, vol. i, p. 389; British Museum, King's MSS., no. 205, p. 514.

[10] The only exception was in the case of those holding land in the Northern Neck (between the Rappahannock and Potomac Rivers), which was granted to Culpeper and his heirs. This grant was revoked, but the quit-rents were retained by Culpeper, by royal permission.

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lege was revoked in the instructions to Berkeley in 1662 and also in those to later governors.[11] In the seventeenth century quit-rents were paid in tobacco, but by the beginning of the eighteenth century they were paid in either tobacco or current money.[12] Although there was some opposition to this revenue and frequent evasion of it, the collections showed a gradual increase. In 1684, for example, £574 was collected, and in 1703, £1843, the total paid in the quit-rents during this time being £22,418.[13] This period—about the middle of the colonial era—seems to be typical with reference to the income from this source. In 1703 £5743 was still held as a surplus, £3000 of which was, by royal order, transmitted to the British exchequer.[14] From 1704 to 1710 the collections of the quit-rents amounted to £14,719, £13,917 of which was paid into the exchequer.[15] In 1715 this revenue produced about £1500 a year; by 1740 the annual income was £3500, and by 1760, £6000. In 1751 the collections, including some arrears, amounted to £16,433.[16]

[11] Hening, vol. i, pp. 228, 280; Virginia Magazine of History and Biography, vol. iii, p. 15; Instructions to the governors.

[12] Hening, vol. i, p. 316; vol. iv, pp. 41, 79; vol. vi, pp. 168, 171; vol. viii, p. 103.

[13] Blathwayt's Journal, vol. ii, p. 356.

[14] Ibid., p. 318. Virginia and New York were the only colonies in which the quit-rents were accounted for to the crown (Cal. St. P. Treas. Books and Papers, 1731–1734, no. 201).

[15] Blathwayt's Journal, vol. iii, p. 84.

[16] C. O. 5: 216, 8; Journal of the Board of Trade, vol. xxv, p. 215; Journal of the House of Burgesses, 1756–1758, p. 513.

RECEIVER-GENERAL'S ACCOUNT OF THE QUIT-RENTS

April 25, 1713–April 25, 1714

Receipts

	£.	s.	d.
Collections (including £35. 11s. 4d. for land escheated to king)	2145	6	1

Disbursements

	£.	s.	d.
Remitted to British exchequer	880	7	5
Expense of remitting the above	4	8	
Salary of Commissary (one year)	100		
" " Attorney-General "	60		

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The relation of the quit-rents to the expenses of the colony, and the necessity of occasional drafts upon this revenue in order to meet them, was shown in a letter of May 30, 1717, from Spotswood to the Board of Trade. Spotswood requested an appropriation, and stated that the revenue derived from the duty of two shillings per hogshead on tobacco lacked £1973. 10s. 4d. of the sum needed to pay the salaries

Salary of Sheriffs (some 10%, some 14%)	131	8	6
" " Auditor, 5% (£1133)	56	13	6
" " Receiver-General "	56	13	6
	1289	11	0
	2145	6	1
	1289	11	0
Net revenue	855	15	1

April 25, 1716–April 25, 1717

Receipts

	£.	s.	d.	
Surplus (April 25, 1716)	2899	16	7¼	
Collections { " " " }	1443	19	2½	—money
Collections { " " 1717 }	370	3	5¾	—tobacco
Arrears (1712–1715)	191	16	8¾	
	4905	16	¼	
Arrears for 1715 }	294	15	9¾	—money
paid in 1716 }	100	2	11½	—tobacco
Arrears for 1714 }	178	7	7	—money
paid in 1716 }	67	13	10¾	—tobacco
	5546	16	3¼	
Disbursements	1780	14	11¼	
Net revenue	3766	1	4	

Disbursements

	£.	s.	d.
Quit-rents for 1714 carried to account of two shillings per hhd. revenue. Apr. 25–Oct. 25, 1716	1022	5	11½
Negotiating bills for above	5	2	2¾
Salary of Commissary (one year)	100		
" " Attorney-General " "	60		
Solicitor of Virginia Affairs, additional salary	150		
Allowance to sheriffs and the people by the order of the government	198	9	9½
Salary of Auditor, 5%	122	8	5¾
Salary of Receiver-General, 5%	122	8	5¾
	1780	14	11¼

The accounts were signed by the receiver-general, the auditor, and the governor (Blathwayt, Virginia Papers, MS.).

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for the preceding year; that the usual expenses amounted to about £3500, and that there was £3766. 1s. 4d. to the credit of the quit-rent account.[17] Three officials were regularly paid by royal warrant out of the quit-rents,—the commissary, the attorney-general, and the solicitor of Virginia affairs; and a fourth, the auditor-general, was added to the list near the close of the colonial period.

While it was necessary on some occasions to appropriate a part of this revenue for the support of the government of the colony, the quit-rents were regularly sent to England.[18] The following instances are indicative of the constant practice of the colony.[19] In 1714, upon royal warrant for this purpose, £855. 15s. 1d., the balance of the quit-rents for the year, was remitted.[20] Upon a warrant under the sign manual of the king of July 19, 1720, the receiver-general was directed to remit by bills of exchange £6791. 7s. 7d., the balance of the quit-rents for 1719 and the surplus.[21] When this revenue reached the royal exchequer, it was not considered as a surplus held there for the future needs of the colony. For example, the quit-rents were used on one occasion at least for the royal service in the West Indies, and on another for paying the chief engraver of seals for seals made for the colonies in America; on another, for purchasing a way through King Street to Parliament House in London, and again for the allowance of £150 a year to the auditor-general of the colonies for office expenses.[22] Some special service connected with the colony was occasionally paid for out of this revenue, such as the running of the boundary line between Virginia and North Carolina, for which £1000 was allotted.[23] A few other instances of special appropriation in

[17] Official Letters of Alexander Spotswood, vol. ii, p. 247. Cited as Spotswood Letters.

[18] Blathwayt's Journal, vol. ii, pp. 391, 469; vol. iii, p. 64.

[19] Journal of the Council of Virginia, MS., 1705–1721, pp. 94, 96; 1721–1734, p. 59; ibid., Extra Session, May 3, 1743; Dinwiddie Papers, vol. ii, pp. 575, 576, 580; Cal. St. P. Col. 1689–1692, no. 1479.

[20] Journal of the Council of Virginia, MS., 1705–1721, p. 226.

[21] Ibid., p. 351.

[22] Cal. St. P. Treas. Books and Papers, 1729–1730, no. 128, p. 235, no. 146; 1739–1741, p. 365.

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addition to the occasional use of the quit-rents for local expenses were the £1000 allowed in 1710 for aiding the British expedition to Canada, £500 for helping New York against the French and Indians and also for building fortifications in Virginia in 1693, £500 for rebuilding William and Mary College in 1709, £250 for a special journey to South Carolina in the interest of Virginia, £1260 for negotiating an Indian treaty (Treaty of Lancaster, 1744), £1320 for negotiating a treaty with the Catawbas and Cherokees in 1756, and other appropriations for similar treaties and also for presents for the Indians.[24] No allotments whatever were to be made from this revenue without royal warrant.

Another source of revenue was the customs duties. There was a duty of one penny a pound on tobacco exported from Virginia and Maryland to any other American colony, known as the plantation duty, which was laid by Parliament in 1672 and granted by the king in 1692 to William and Mary College; it amounted to about £200 a year.[25] The duty on exported skins and furs, paid by the exporter, which ranged from three farthings to two shillings, or five shillings for tanned hides, was first imposed in 1691 by the Assembly and appropriated for the support of William and Mary College. It amounted about 1700 to nearly £300 a year.[26] The placing of this duty, together with Indian wars, however, caused the fur trade to decline so greatly that the annual income derived from this revenue was later not more than £100.[27] The duty on imported liquors, except those from England, was from three to six pence a gallon, which was

[23] Journal of the Council of Virginia, MS., 1721–1734, pp. 215, 351.

[24] Cal. St. P. Col. 1693–1696, nos. 1683, 1715; Journal of the Board of Trade, vol. ii, p. 283; vol. iii, p. 274; vol. v, p. 175; Blathwayt's Journal, vol. i, p. 684; vol. ii, p. 561; vol. iii, p. 85; Journal of the Council of Virginia, MS., 1705–1721, p. 288; Cal. St. P. Treas. Papers, 1708–1714, p. 94; 1742–1745, p. 677; Dinwiddie Papers, vol. ii, p. 465.

[25] H. Hartwell, J. Blair, and E. Chilton, An Account of the Present State and Government of Virginia, p. 60; Journal of the Board of Trade, vol. x, pp. 219, 220.

[26] Hening, vol. iii, pp. 63, 356; vol. iv, p. 431; vol. v, p. 236; vol. vi, p. 91; vol. vii, p. 283; vol. viii, p. 142.

[27] R. Beverley, The History of Virginia, p. 214; Sainsbury Papers, vol. iii, pp. 525, 530.

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appropriated by the Assembly of 1684 for the support of the government.[28] In 1726, £200 annually was granted out of this revenue to William and Mary College, and in 1734 one penny a gallon, or one fourth of the revenue at that time, was given to the college.[29]

The duty on slaves brought into the colony, which was levied by the Assembly in 1699 for the purpose of rebuilding the capitol, and was later appropriated for the support of the government, was twenty shillings, paid by the importer, and, for a brief time, six pence paid by the master of the ship, on every slave. By 1732 this duty was changed to five per cent, later increased to twenty per cent, of the purchase price of each slave, paid by the purchaser within forty days after the sale. In 1772 a special duty of £5 a head was imposed on slaves imported from the West Indies, Maryland, Carolina, or any other American colony.[30] The duties on liquors and slaves amounted in 1708 to about £2000 a year.[31] The duty on servants, which was imposed by the Assembly in 1699 for the purpose of rebuilding the capitol, and was later appropriated for the support of the government, was fifteen shillings, paid by the importer, and six pence, paid by the master of the ship, on every servant imported. The duty on servants is not mentioned in the acts of Assembly after 1710.[32] The duty on passengers brought into the colony, imposed by the Assembly in 1662 for the purpose of furnishing additional compensation to the captain of the fort at Point Comfort, but later (1680) appropriated for the support of the government, was six pence on "every person imported, not being a mariner," paid by the master of the ship. This regulation must have included

[28] Hening, vol. iii, pp. 23, 229; vol. iv, pp. 144, 470; vol. v, p. 311; vol. vi, pp. 194, 354; vol. vii, pp. 133, 266, 274, 386; vol. viii, pp. 38, 335, 529.

[29] Ibid., vol. iv, pp. 148, 432; vol. v, p. 317; vol. viii, p. 335.

[30] Ibid., vol. iii, pp. 193, 233, 346, 492; vol. iv, p. 317; vol. v, p. 28; vol. vi, pp. 218, 419, 466; vol. vii, p. 81; vol. viii, pp. 338, 532.

[31] Of the £4000 collected for the years 1706–1708, £3000 was appropriated for building the governor's house (Calendar of Virginia State Papers, 1652–1781, vol. i, p. 124).

[32] Hening, vol. iii, pp. 193, 346, 492.

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servants and slaves until special duties were imposed for them. The duty on passengers is not mentioned in the acts of Assembly after 1710.[33]

During the whole colonial period neglect and fraud were more or less prevalent in connection with the several revenues. In 1640 the secretary of the colony, Richard Kemp, petitioned the king to be allowed to go to England in order to answer the unjust charges against him of those who had been defrauding the revenues of the colony.[34] The royal quit-rents were perhaps more often evaded than any other duties.[35] In 1721, however, the auditor-general stated to the Board of Trade that they were in good condition and were increasing in value.[36] In 1753 Dinwiddie estimated that there were about a million acres of land, held by certain colonists, on which no quit-rents had been paid. This statement was no doubt made largely to justify his action in imposing the pistole fee ($3.60) for affixing the seal of the colony to land grants.[37] The governor laid this fee in order to increase his perquisites, but he could not collect it. The duty on tobacco of two shillings per hogshead was very often evaded, and the governor was instructed to endeavor to prevent frauds and abuses in the collecting of this revenue.[38] Shipmasters would sometimes evade this and other duties by making false entries as to their lading,[39] an abuse which the Council sought to remedy by requiring £500 security of every vessel.[40] Liquors and other imports were often smuggled into the colony to avoid payment of the

[33] Hening, vol. ii, pp. 135, 466; vol. iii, pp. 346, 492.
[34] Sainsbury Papers, 1640–1691, p. 4.
[35] Ibid., 1691–1697, p. 350; Journal of the Council of Virginia, MS., 1721–1734, p. 414; Journal of the Board of Trade, vol. x, p. 266; Cal. St. P. Col. 1681–1685, no. 203.
[36] Journal of the Board of Trade, vol. xxxi, p. 152.
[37] Dinwiddie Papers, vol. ii, pp. 363, 370, 374, 410.
[38] P. A. Bruce, Economic History of Virginia in the Seventeenth Century, vol. i, p. 452; Journal of the Board of Trade, vol. xxxvi, p. 355; Instructions to the governors from Nicholson (1702) to Dunmore (1771).
[39] Journal of the Board of Trade, vol. iii, pp. 306, 338; vol. x, p. 218; vol. xliii, p. 58.
[40] Cal. St. P. Col. 1689–1692, no. 1324.

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duty.[41] Not only the planters and masters of ships, but even the revenue officials themselves were sometimes guilty of defrauding the government by evading the duties.[42]

A letter from the Council of Virginia regarding the frauds in the customs, sent to the Board of Trade in 1733, was referred to the committee of the House of Commons having charge of such investigations.[43] When the matter was under discussion in the House of Commons, the commissioners of the customs stated that the total amount of such evasion was £30,000 or £40,000 a year. This estimate, however, included not only the evasion in all the colonies, but also all the frauds connected with the customs in England.[44] It would be difficult to ascertain the exact amount for Virginia alone.

The instructions to the governors from Nicholson (1702) to Dunmore (1771) made special mention of the frauds in the customs of the plantation trade, and insisted upon the greatest care to prevent them. It was stated that such abuses "must needs arise either from the insolvency of persons who are accepted for security, or from the remissness or connivance of such as have been or are governors in the several plantations." This clause had reference to Virginia as well as to the other British colonies and was therefore included in the above instructions. Though it was said that the governor was perhaps partly responsible for this condition of affairs, and that should he fail to endeavor to prevent a continuance thereof his commission would be forfeited, no governor of Virginia was removed for this offense. In addition to the formal instructions there were additional instructions and circular letters sent to the governor from time to time for the purpose of preventing illegal trading and evasion of the customs. A circular letter of June 21, 1768, sent to practically all the governors in the American colonies and in the West Indies,

[41] Journal of the Council of Virginia, MS., 1705–1721, p. 202.
[42] Spotswood Letters, vol. i, p. 103; vol. ii, p. 176.
[43] Journal of the Board of Trade, vol. xliii, p. 58.
[44] St. G. L. Sioussat, "Virginia and the English Commercial System," in Report of the American Historical Association, 1905, vol. i, p. 90.

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requested suggestions as to any needed changes in the "general instructions," with special reference to revenues, and stated that "the little improvement which has been made in his majesty's revenue of quit rents, notwithstanding the rapid progress of settlement, shows that either the instructions given, relative to this object, are imperfect or inadequate or that there has not been sufficient attention given to the due execution of them."[45] Though there were evasions of the quit-rents in Virginia, this revenue amounted to more there than this circular letter would indicate.

Every law enacted by the Assembly that was concerned with the revenues, both royal and provincial, carried with it a penalty for violation, and special provision was made for preventing, if possible, any irregularities on the part of the officials. The Assembly honestly endeavored to prevent the evasion of the revenues, but the laws were not strictly enforced.

In addition to the revenues already considered, there was a system of taxation by poll for raising the public, county, and parish levies. A poll tax, known as a public levy, was laid every session by the House of Burgesses through the committee of claims, to which all public claims were referred. This revenue was used for the expenses of the meeting of the Assembly, for paying the militia, for the erection of the capitol, the execution of criminals, the capture of runaway servants and slaves, and all such public claims.[46] The public levy was, therefore, not uniform, but varied from year to year. It was usually about 15 or 20 pounds of tobacco for each tithable.[47] From 1624 to 1775 the smallest levy imposed was 3¼ pounds, and the largest was 89 pounds. In addition to the usual public levy, extra levies were imposed for meeting such an emergency as war.

[45] C. O. 5: 241, 79.

[46] Journal of the House of Burgesses 1700–1702, pp. 218–220, 229–230. G. Webb, The Office and Authority of a Justice of the Peace, p. 211; Hartwell, Blair, and Chilton, p. 54; Hening, vol. iii, p. 25.

[47] Hening, vol. i, p. 143; vol. ii, p. 507; vol. iii, p. 481; vol. iv, p. 300; vol. v, p. 67; vol. vi, p. 247; vol. vii, p. 139; vol. viii, p. 533.

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The county levy, also a poll tax, was laid by the justices of the peace, and was used in the payment of all county debts, such as the building and the repairing of the court-house, the prison, the bridges, and the ferry-boats; the cost of the coroner's inquests, and especially—until 1730 the largest obligation—the allowance to the two burgesses for their transportation to the capital and their expenses while attending the Assembly. The total expenses of the county were annually computed by the county court, with the assistance of the justices of the peace, and were divided equally among the tithables of the county.[48]

Another poll tax, the parish levy, was laid annually by the vestry of each parish for the payment of all parish debts, such as the erection of churches, the minister's salary, the clerk's salary, the care of the poor, and any other parish expenses. The Anglican Church was the established church of the colony, and all, regardless of religious belief, were compelled to support it. The parish levy, as well as the public and county levies, varied from year to year. The churchwardens, who supervised the collection of this levy, usually had the sheriff, who also gathered the public and county levies, collect it for them.[49]

The tithables of the colony included all male persons of any color above sixteen—later eighteen—years of age, and all negro, mulatto, and Indian women above sixteen. By 1769, however, free negro, mulatto, and Indian women were exempted.[50] The three methods of raising funds just mentioned were all poll taxes, and the levies amounted annually to about one hundred pounds of tobacco for each tithable. It was estimated that they aggregated at the beginning of

[48] Hartwell, Blair, and Chilton, p. 54; Webb, p. 211; Hening, vol. iv, pp. 279, 370.

[49] Hening, vol. vi, p. 88; Hartwell, Blair, and Chilton, pp. 53, 55; H. Jones, The Present State of Virginia, p. 63.

[50] Dinwiddie Papers, vol. ii, p. 474; Beverley, p. 204; Webb, p. 211; Hening, vol. viii, p. 393. Negro, Indian, and mulatto children were entered in the parish register at their birth, so that it might be ascertained when they became sixteen years of age (Hening, vol. ii, p. 296).

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the eighteenth century about 2,000,000 pounds of tobacco a year.[51] None of these levies were paid to the receiver-general, whose duty it was to receive the royal revenues. The public levy was paid to the treasurer of the colony, the county levy into the county treasury, and the parish levy into the parish treasury. These levies, of course, increased as the number of tithables increased.[52]

Royal Collectors.—The British government could not carry out fully its commercial policy owing to the difficulty in enforcing the regulations regarding the colonial export trade to England, which was mainly the result of there being, especially in the earlier part of the seventeenth century, no customs officials in any of the colonies except Virginia. In 1624, in order to prevent the cultivation of tobacco in England and the illegal importation of it into English ports, a proclamation was issued that all colonial tobacco was to be brought to London.[1] In 1627 and again in 1628 the governor of Virginia was instructed by the British government to take security from the masters of ships that all tobacco would be taken to London. In order further to prevent the direct shipment of tobacco to foreign countries, there was instituted in Virginia in 1631 the system of requiring bonds that tobacco and other products would

[51] Hartwell, Blair, and Chilton, p. 55.

[52] Statistics for every year cannot be obtained.

	Population.	Tithables.	
1671	40,000	——	(British Museum, Add. MSS., no. 30372, p. 46.)
1697	70,000	20,000	(Sainsbury, 1691–1697, pp. 317, 342.)
1699	58,040	21,606	(Cal. St. P. Col. 1701, p. 636.)
1700	——	24,291	(Ibid., p. 640.)
1702	——	25,099	(Ibid., 1702, no. 767.)
1723	——	39,761	(Virginia Historical Register, vol. iv, p. 67.)
1726	——	45,266	(Ibid., p. 74.)
1756	293,472	*103,407	(Dinwiddie Papers, vol. ii, p. 474.)

* Whites 43,329, negroes 60,078.

[1] G. L. Beer, The Origins of the British Colonial System, 1578–1660, pp. 197–205.

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be landed at London.[2] By 1636 the governor was instructed by the king to appoint an officer to keep a register of all exports from the colony, and to forward copies thereof to the lord treasurer. The Assembly, upon receipt of this instruction, created the office, and granted to the incumbent a fee of two pence on every hogshead of tobacco exported, which was paid by the masters of ships, and also certain fees on other products. Richard Kemp, secretary of the colony, was appointed to this office by the governor, but Jerome Hawley was about the same time appointed by the British government treasurer of Virginia, and in addition to collecting the quit-rents, was also authorized to keep the register of the exports of the colony. In the contest between Kemp and Hawley for the right to keep the register and to collect the fees, the royal appointee, Hawley, was successful. On the death of Hawley, which occurred soon after, Kemp was allowed to resume his duties as register. This was the first colonial customs office for imperial purposes.[3] Although this office was established by the Virginia Assembly, it was in obedience to an order from the king that the governor made the appointment. Jerome Hawley was the first of the large number of royal customs officials who somewhat later were concerned with the administration of the colonies.[4] The register was the direct predecessor of the collectors, the naval officers, and other customs officials of the period following the Restoration, and the report of the register forwarded to the lord treasurer was the forerunner of the "naval office lists," which after 1700 were sent quite regularly to England.[5]

During the Cromwellian period the customs officials were appointed by the Assembly and were responsible to it; their work was to receive the customs duties, especially the duty of two shillings per hogshead on exported tobacco, laid in March, 1657/8. This act was to remain in force for one year,

[2] Beer, Origins, pp. 197–205. Virginia Magazine of History and Biography, vol. vii, pp. 258, 259, 375, 385, 386.
[3] Beer, Origins, p. 208.
[4] Ibid.
[5] Ibid., pp. 207, 208, note. Hartwell, Blair, and Chilton, p. 60.

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and was repealed at the expiration of that time. In March, 1662, this duty was reestablished, and, as formerly, the customs officials were appointed by the Assembly and were accountable to it.[6] Although this took place after the Restoration, still, as in the case of the former act, the Assembly controlled the appointment and had general supervision of the officials. There was no mention of the commissioners of the customs in this act. On August 25, 1669, however, the commissioners of the customs in England appointed Edward Diggs to have charge of the revenues in Virginia and to correct abuses in the customs.[7] He was referred to as the "collector of Virginia," and he received a salary of £250 a year, paid by the receiver-general of customs in England.[8] The collectors, who were formerly commissioned by the Assembly, were soon also made royal officials. They[9] were thereafter, in accordance with an act of Parliament, appointed by the commissioners of the customs under the authority of the lords of the treasury.[10] The commissioners of the customs, with the approval of the lords of the treasury, suspended or removed a collector, transferred him from one district to another, or granted him permission to go to England.[11] The surveyor-general of the customs for the southern district of America, acting under instructions from the commissioners of the customs, had general supervision of these officials, examined their accounts, issued instructions to them, and had authority to

[6] Hening, vol. i, pp. 491, 523; vol. ii, p. 130.

[7] Cal. St. P. Col. 1669–1674, no. 104; Cal. St. P. Treas. Books, iii, Part 2, 1669–1672, p. 1126.

[8] Cal. St. P. Treas. Books, iv, 1672–1675, p. 427.

[9] Not to be confused with the collectors of the duties on skins and furs, on liquors, and on servants and slaves, appointed by the governor; or with the collectors of the six pence per month from seamen's wages for the royal hospital at Greenwich, appointed by commissioners in England for this purpose.

[10] Cal. St. P. Treas. Books, iv, 1672–1675, p. 456; Journal of the Council of Virginia, MS., 1698–1703, p. 25; Hartwell, Blair, and Chilton, p. 33; Cal. St. P. Treas. Books and Papers, 1731–1734, pp. 398, 524; Beverley, p. 198; British Museum, King's MSS. no. 205, p. 498.

[11] Cal. St. P. Treas. Books and Papers, 1731–1734, p. 398; Cal. St. P. Col. 1675–1676, no. 698; Journal of the Council of Virginia, MS., 1705–1721, p. 60.

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suspend them, subject, of course, to the approval of the commissioners.[12]

The governor administered the oath of office to the collectors and saw that they obeyed the instructions of the commissioners of the customs; in case of emergency he might make a temporary appointment.[13] He was empowered to "immediately remove" any collector guilty of fraud or neglect, to "appoint a fit person in his stead," and to notify the king at once, through one of the principal secretaries of state and the lords of the treasury.[14] The collectors gave bond to the king, countersigned by the attorney-general of Virginia, and took oath in the Council to execute faithfully the acts of Parliament in virtue of which they were commissioned.[15]

For a few years the offices of collector and naval officer were combined, as the duties pertaining to them were very closely related, but by 1699 they were separated. There were then eight collectors, soon reduced to six, who were assigned the districts near the larger rivers and Chesapeake Bay. These six districts were the same that were assigned the naval officers.[16] The members of the Council at first controlled these offices, and at certain times all six collectorships were held by them.[17] By 1699, however, the royal instructions to the governor specified that councillors were to be prohibited from holding the office of collector,

[12] Journal of the Council of Virginia, MS., 1698–1703, p. 147; British Museum, Add. MSS. no. 8832. Collectors' accounts of the one penny a pound duty on tobacco shipped from one colony to another were inspected by officials of William and Mary College, which institution received this revenue. After their examination the accounts were sent to the commissioners of customs (Cal. St. P. Col. 1696–1697, p. 457).

[13] Journal of the Council of Virginia, MS., 1698–1703, pp. 56, 100; 1705–1721, p. 90; Virginia Magazine of History and Biography, vol. i, p. 244.

[14] Instructions to the governors.

[15] Journal of the Council of Virginia, MS., 1698–1703, p. 60; Sainsbury, 1625–1715, p. 26.

[16] Upper James River, Lower James River, York River, Rappahannock River, Potomac River, and the Eastern Shore (Hening, vol. iii, p. 195; Journal of the Council of Virginia, MS., 1698–1703, p. 36; Beverley, p. 195).

[17] Cal. St. P. Col. 1689–1692, no. 2295.

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as their services in this capacity had not been satisfactory.[18] That there was good reason for this action of the British government is clearly demonstrated in the conniving at fraud, the accepting of bribes, and the actual complicity with pirates by collectors, both before and after the members of the Council were prohibited from holding the office.[19] After 1699 the clause in the instructions directing the governor to see that no member of the Council served in this capacity specified that "persons much concerned in trade" were also to be excluded.

At first the collectors were not permitted to have deputies, but, owing to the distance which some of them lived from the ports, it was deemed advisable by 1673 to grant their request in this regard, and they were empowered to appoint them, subject to the approval of the Council.[20] The granting of this privilege was not conducive to the best interests of the colony, for according to a contemporary authority (1698) the revenue from the duty of two shillings per hogshead on tobacco was not so large as formerly because the regular officers lived away from the ports and entrusted the duties to "unsworn deputies," and they, in turn, to "unsworn masters of ships and exporters."[21] Because of fraud and neglect in the collection of this duty, the governors from Nott (1705) to Dunmore (1771) were instructed to refuse to allow collectors to have deputies, except in case of absolute necessity, and in such cases to require the deputies as well as the regular officials to take a solemn oath to perform their duties.[22]

The collectors received certain import and export duties, such as the two shillings per hogshead on exported tobacco,

[18] Journal of the Council of Virginia, MS., 1705–1721, p. 55; Hartwell, Blair, and Chilton, p. 59; Cal. St. P. Col. 1699, p. 312.

[19] Cal. St. P. Col. 1689–1692, nos. 2199, 2284, 2295; Cal. St. P. Treas. Papers, 1689–1692, pp. 659, 660, no. 3177; 1693–1696, no. 1510; 1714–1719, p. 481; Hening, vol. iii, p. 232.

[20] Cal. St. P. Treas. Books, vol. iv, 1672–1675, pp. 427, 437, 456; Cal. St. P. Col. 1689–1692, nos. 2317, 2388; 1697–1698, no. 645; 1696–1697, no. 1320.

[21] Hartwell, Blair, and Chilton, p. 59.

[22] Instructions to the governors.

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and the one penny per pound on tobacco shipped from Virginia to any other American colony. After 1680 they also received the fifteen pence per ton on ships and the six pence per poll on persons brought into the colony. They were to endeavor to prevent illegal trade, and as far as possible to aid in the capture of runaway servants and slaves.[23] In some cases the collectors were appointed by the governor and the Council as justices of the peace, in order that they might detect illegal trade and seize prohibited goods, and they also acted as notaries public in matters relating to maritime affairs.[24] The passes sent by the lords of the admiralty to protect ships from seizure were furnished to masters of ships by the collectors. Owing to several complaints, after 1728 they and other customs officers were exempted from serving on juries, in parochial offices, or in the military service, unless it was absolutely necessary, as they were hindered in the performance of their duties thereby.[25] This exemption was made in obedience to the governor's instructions.

The collectors were at first paid only in fees, but later each received out of the British treasury a salary of from £40 to £100 according to the importance of his district; each had, moreover, twenty per cent on all duties collected, and also fees, fixed by the Assembly, for entering and clearing ships.[26] The income from the percentage of course varied. Their total allowance for collections for a part of the year 1706

[23] Journal of the Board of Trade, vol. x, pp. 219, 220; Cal. St. P. Treas. Papers, 1720–1728, p. 97; Cal. St. P. Col. 1693–1696, no. 1700; 1696–1697, no. 290; Hartwell, Blair, and Chilton, pp. 33, 61; Dinwiddie Papers, vol. i, p. 389.

[24] Journal of the Council of Virginia, MS., 1698–1703, pp. 89, 111; 1721–1734, p. 156; Cal. St. P. Col. 1699, p. 495.

[25] Instructions to the governors.

[26] Hening, vol. ii, pp. 387, 443; vol. iii, p. 110; Dinwiddie Papers, vol. ii, p. 597 note; Beverley, p. 198; British Museum, King's MSS. no. 205, p. 498; British Museum, Add. MSS. no. 8831, p. 122. For entering and clearing a ship of 50 tons or less, 10s.; 50 to 100 tons, 15s.; 100 tons or more, £1. 5s. For taking a bond from the master of a ship, 2s. 6d.; a certificate of duties paid, 2s. 6d. Half of these fees only were charged ships owned by Virginians (Hening, vol. iii, pp. 195, 351; vol. vi, p. 96; Webb, p. 308).

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was £480. 18s. 7d.[27] A table of all fees was to be exhibited for the information of the public. For the first offense of charging excessive fees £100 fine was to be imposed, and for the second, the commission was to be forfeited. Apparently these penalties were not strictly enforced.

The collectors swore to their accounts before the auditor, the receiver-general, and the governor in Council; the accounts were examined by these officials, forwarded quarterly to the auditor-general of the colonies and the commissioners of the customs, and finally examined by the comptroller-general of the accounts of the royal customs.[28] It was by order of the commissioners of the customs that the collectors paid to William and Mary College the revenue arising from the duty of one penny per pound on tobacco exported to other American colonies.[29] Complaints made by London merchants or others that a collector was concerned in trade or was guilty of fraud were reported to the Board of Trade, and by that body referred to the commissioners of the customs.[30] It was said on several occasions that collectors failed to render correct accounts of their revenues, and they were openly charged with having misappropriated these funds.[31] In a letter to the Board of Trade of November, 1700, the surveyor-general of the customs showed how it was possible for collectors to evade the customs laws. He stated that it had formerly been the practice of some of these officials who were large planters, and who received one half of the duty on tobacco carried from Virginia and Maryland to other colonies, to take off about one third of the half due from masters of ships provided they would purchase their whole loading from them. The short entries made on the books were connived at by those concerned,

[27] Blathwayt's Journal, vol. ii, p. 469.

[28] Journal of the Council of Virginia, MS., 1705–1721, p. 76; 1721–1734, pp. 44, 109; Cal. St. P. Col. 1685–1688, no. 745; 1689–1692, no. 2317; 1693–1696, no. 1829; 1696–1697, no. 1320; 1701, nos. 369, 423.

[29] Journal of the Council of Virginia, MS., 1705–1721, p. 90; Cal. St. P. Col. 1696–1697, p. 457.

[30] Journal of the Board of Trade, vol. xxvi, p. 299.

[31] Virginia Magazine of History and Biography, vol. ii, pp. 166, 169, 170, 386–389; vol. iii, p. 35.

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as was indicated on one occasion by the books of the collectors on James River and Potomac River.[82] As late as 1766 an act was passed by the Assembly for "preventing frauds in the customs," the preamble of which was as follows: "Whereas it is almost impossible to detect officers who charge greater fees than by the said act of Assembly are allowed," and so on.[83] Collectors and naval officers were therefore required under penalty of a fine of £10 to furnish receipts for all fees paid to them. The requiring of the collectors to furnish the commissioners of the customs with a list of all vessels owned by the colonists was done to prevent the collectors from owning trading ships, as well as to keep the commissioners informed in regard to the trade of the colony.

Naval Officers.—The Navigation Act of 1663 created the post of naval officer. The first direct mention of such an official was in 1672, in connection with Barbadoes, but it was stated at that time that there had been earlier incumbents.[1] In Virginia the governor at first appointed and removed these officers,[2] but by 1698 the nominations were approved by the commissioners of the customs and the appointees required to furnish security to them.[3] By 1763 they were named under the great seal of Great Britain.[4] Even when the governor had the power of appointment and removal, any suspension or removal could be referred to the Board of Trade by the aggrieved officer for examination.[5] The governor was not to imprison or suspend any of the officers

[82] Cal. St. P. Col. 1700, no. 906.

[83] Hening, vol. viii, p. 251.

[1] C. M. Andrews, Colonial Self-Government, 1652–1689, p. 33.

[2] Journal of the Council of Virginia, MS., 1705–1721, p. 22; 1721–1734, p. 159; Calendar of Virginia State Papers, vol. i, pp. 210, 233; Virginia Magazine of History and Biography, vol. i, pp. 244, 374; vol. iv, p. 52; Hartwell, Blair, and Chilton, p. 24.

[3] Journal of the Council of Virginia, MS., 1698–1703, p. 25; Sainsbury, 1720–1730, p. 354; Cal. St. P. Col. 1700, no. 752; Instructions to governors from Nott (1705) to Dunmore (1771).

[4] British Museum, King's MSS. no. 205, p. 495; Journal of the Board of Trade, vol. lxix, pp. 135, 186, 195.

[5] Journal of the Board of Trade, vol. xxiii, p. 58.

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of the royal customs except in cases of felony, murder, or treason, but he was to report any other offenses to the commissioners of the customs.[6] The naval officers were at first usually selected from the Council, and for a certain time only councillors held these positions,[7] but by 1699 the royal instructions specified that councillors should not be appointed.[8] As soon as the councillors were prohibited from serving in this capacity, the offices of naval officer and collector, which had been held by one person in each district, were separated.[9] The number of naval officers was, until about 1700, eight, but was then reduced to six. After 1705 they were not permitted to have deputies, except in case of absolute necessity.[10]

Naval officers were assigned the same districts as the collectors, and received certain fees.[11] Later, according to the importance of their districts, they were paid from £40 to £100 annually out of the British treasury; in addition, they received the fees allowed by the Assembly and collected in the colony.[12] While the perquisites were somewhat smaller than those of the collectors, the annual income, with the fees included, was in some cases rather large.[13] In 1763

[6] Cal. St. P. Col. 1700, p. 638.

[7] Cal. St. P. Col. 1696–1697, nos. 306, 1320; 1689–1692, no. 2295; 1697–1698, no. 913; Journal of the Board of Trade, vol. x, p. 217; Hartwell, Blair, and Chilton, p. 24.

[8] Cal. St. P. Col. 1699, p. 312; Journal of the Council of Virginia, MS., 1705–1721, p. 55; Journal of the House of Burgesses, 1698–1699, p. 185.

[9] Cal. St. P. Col. 1699, p. 312; 1700, p. 311; 1701, no. 1182; Journal of the Council of Virginia, MS., 1705–1721, p. 133; Spotswood Letters, vol. i, p. 8; Hening, vol. iii, p. 195.

[10] Journal of the Council of Virginia, MS., 1705–1721, p. 37; Cal. St. P. Col. 1697–1698, no. 767; British Museum, King's MSS. no. 205, p. 495; Hartwell, Blair, and Chilton, p. 24.

[11] Sainsbury, 1691–1697, p. 345; Beverley, p. 198.

[12] Hening, vol. ii, pp. 387, 443; vol. iii, p. 110; Dinwiddie Papers, vol. ii, p. 597, note; British Museum, Add. MSS. no. 8831, p. 122.

[13] Four of the six naval officers received, about 1705, from £200 to £300 a year; the fifth, £160, and the sixth, on the Eastern Shore, very little (Sainsbury, 1705–1707, p. 133; British Museum, King's MSS. no. 205, p. 493; Journal of the Council of Virginia, MS., 1705–1721, p. 133).

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one naval officer received £600 in fees alone.[14] Naval officers were required to post in their offices a list of these fees. The penalty for exceeding them was a fine of £100 for the first offense, and for the second offense, removal, ineligibility to office, and a fine of £20 payable to the informer. That irregularities occurred, notwithstanding this provision, and that naval officers evaded the enforcement of the penalties seems evident from the preamble to the law enacted in 1766 requiring them to furnish a receipt for every fee collected: "Whereas it is almost impossible to detect officers, who charge greater fees than by the said act of Assembly are allowed, unless the officer or officers demanding and receiving the same, be obliged to give receipts for such fees," and so on. Any naval officer refusing to give a receipt was subject to a fine of £10, payable to the informer, in any court of record in the colony.[15]

The duties of the naval officers were closely related to those of the collectors, and certificates furnished by naval officers for clearing ships and bonds taken by them were not valid unless approved by the collectors.[16] In addition to entering and clearing ships, the naval officers required a bond from the master of a merchant vessel that his statement in regard to his cargo was true, an oath that he would pay all required fees and would observe the trade laws, and a certificate that he would guarantee to land the cargo in an English port. They granted permission to masters to have their ships loaded, seized vessels trading unlawfully or refusing to pay port duties, took charge of prize ships awaiting the decision of the court, and captured runaway

[14] For entering and clearing a ship of 50 tons or less, 7s. 6d.; 50 to 100 tons, 10s.; 100 tons or more, £1. 5s.; for taking a bond from the master of a ship, 2s. 6d.; for a certificate to remove goods from one district to another, 2s. 6d.; for a permit to trade, 2s. 6d.; for a loading cocket, 6d.; for a permit to load a ship for exportation, 2s. 6d. Virginia-owned ships paid only one half of the fees (Hening, vol. iii, pp. 195, 351; vol. vi, p. 97; British Museum, King's MSS. no. 206, p. 339; Webb, p. 309).

[15] Hening, vol. iii, pp. 196, 197, 352, 353; vol. vi, pp. 97, 98; vol. viii, p. 251.

[16] Journal of the Council of Virginia, MS., 1698–1703, p. 25.

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servants and slaves and also pirates.[17] They furnished the governor and the Council with a list of all ships in their respective districts and with minute descriptions of their tonnage, cargo, guns, number of sailors, owners, and so on.[18] They also sent to the British government quarterly statements of the imports and exports, with an account of all ships trading in the colony, whence they came and whither they were bound.[19] The orders of the Council to masters of ships to attend the meetings of the Council or to perform some special duty were sent through the naval officers.[20] On one occasion the naval officers, by order of the Council, assisted the captain of a royal ship sent to guard the Virginia coast by providing a sloop to accompany him and securing a house for his sick sailors.[21] They acted as notaries public in maritime affairs.[22] It is of interest to read that the French and Spanish prisoners sent on one occasion to Virginia from Carolina were placed in charge of the naval officers to be disposed of in any way they thought best for the good of the country.[23] Naval officers reported to the attorney-general the bonds furnished by the masters of ships, in order that he might prosecute those giving them as soon as they should be forfeited.[24]

Naval officers swore to their accounts before the governor and Council after they had been passed on by the receiver-general and the auditor, by whom they were sent to the auditor-general and the commissioners of the customs.[25]

[17] Journal of the Council of Virginia, MS., 1705–1721, pp. 72, 96; Calendar of Virginia State Papers, vol. i, pp. 19, 30, 34, 92; Hening, vol. iii, p. 350; vol. iv, p. 430; vol. vi, p. 95; Spotswood Letters, vol. i, p. 3; Cal. St. P. Col. 1699, p. 148.

[18] Journal of the Council of Virginia, MS., 1705–1721, pp. 71, 95; Cal. St. P. Col. 1701, pp. 369, 423.

[19] Cal. St. P. Col. 1677–1680, no. 1590.

[20] Journal of the Council of Virginia, MS., 1705–1721, pp. 38, 63, 65, 110.

[21] Ibid., p. 86.

[22] Cal. St. P. Col. 1699, p. 495.

[23] Journal of the Council of Virginia, MS., 1705–1721, p. 65.

[24] Cal. St. P. Col. 1700, p. 514. Bonds of £1000, in some cases £2000, were given (C. O. 5: 188, 26; 190, 196).

[25] Journal of the Council of Virginia, MS., 1698–1703, pp. 99, 103, 166–169; Cal. St. P. Col. 1700, nos. 359, 934, 1057.

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On account of the distance of certain naval officers from the capital, and the sickness of others, at certain times they were allowed to make oath before a justice of the peace as to the truthfulness of their accounts, and to send them to the governor and the Council. Once a year they had to settle personally with the governor and the Council.[26] One of the principal objections raised by the Board of Trade to the service of members of the Council as naval officers was that they rendered their accounts to themselves, and that they were interested in trade.[27] It is not strange that some cases of fraud were detected.[28] One authority stated in 1698 that councillors serving as naval officers exacted from £3 to £4 for clearing a ship of one hundred tons or more, for which £1. 5s. was the maximum fee.[29]

Comptrollers of the Customs.—The comptrollers of the customs were, as their name indicates, revenue officials. They were instituted near the close of the colonial period, and were appointed by the commissioners of the customs for the six revenue districts of the colony. They were not to supersede the regular naval officers and collectors, nor, of course, the surveyor-general of the customs, but were to cooperate with them. Their appointment was apparently an additional effort on the part of the British government to supervise the work of the collectors and the naval officers, and to prevent fraud. Their salaries were paid by order of the commissioners of the customs, but the fees to be collected by them, as by all royal revenue officials, were determined by the Assembly. The latter fact accounts for a petition of December 18, 1764, to the governor and the Council, referred by them to the House of Burgesses. Three comptrollers requested to be allowed to charge fees on all ships

[26] Journal of the Council of Virginia, MS., 1705–1721, pp. 19, 118, 131.

[27] Cal. St. P. Col. 1697–1698, no. 767; Hartwell, Blair, and Chilton, p. 33; Instructions to the governors from Nicholson (1702) to Dunmore (1771).

[28] Journal of the Council of Virginia, MS., 1705–1721, p. 22; Cal. St. P. Col. 1697–1698, p. 401; Sainsbury, 1706–1714, p. 298.

[29] Hartwell, Blair, and Chilton, p. 33.

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trading in the colony. The salaries of the three in question were £30 a year for the one serving in the upper district of the James River, £50 for the one serving in the lower district of that river, and £40 for the one serving on the Eastern Shore. They complained that these salaries were too small, and requested to be allowed to charge the "same fees as are allowed by law to the collectors of his majesty's customs, or such other fees as shall be thought reasonable," but the petition was refused.[1]

Among the duties performed by the comptrollers was the searching of ships with the cooperation of the collectors and the naval officers, on the authority of writs of assistance. This is shown by the following letter, in which the collector and the comptroller of Accomac wrote to the commissioners of the customs, on April 22, 1772, as follows: "Agreeable to our letter of November last, we, together with other officers, made application for writs of assistance, to the Supreme Court,[2] but were refused them, for the same reasons as were given before, viz.: that application must be made for them every time we have occasion for them, and not for general writs of assistance."[3] The collector and the comptroller of the lower district of the James River had the same experience the next year.[4] The attorney-general of Virginia, who had failed to secure writs for them, made the following explanation to the collector on April 26, 1773: "I have moved the court for a writ of assistance, agreeable to the desire of the commissioners of the customs, and according to the form of the writ said by the attorney general of England, to be practiced there, but they have positively refused it, and declared that they can allow no other writ than such a one as was settled upon a former occasion, agreeable to our act of Assembly. I despair of ever obtaining what is wished for."[5]

[1] Journal of the House of Burgesses, 1761–1765, p. 301.
[2] General court of Virginia.
[3] C. O. 5: 145, 8[c].
[4] Ibid., 8[m].
[5] Ibid., 8[n].

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Surveyors-General of the Customs.—The surveyors-general of the customs for America and the West Indies were first appointed about 1690. There was one for the northern district, another for the southern district, and a third for certain British island possessions. In the southern district were included Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, the Bahama Islands, and Jamaica.[1] These surveyors-general were appointed by the commissioners of the customs, and received instructions from them.[2]

The surveyor-general of the customs for the southern district was a member of the Council in Virginia, South Carolina, and Jamaica,[3] and up to 1733 was granted all the privileges of a councillor; after that date, he was considered an extraordinary councillor only, unless admitted to these privileges by the crown.[4] The Council of Virginia refused to allow Robert Dinwiddie, appointed in 1741, to act with it in a legislative or judicial capacity, and appealed to the king to have his instructions so changed. It was decided by the Privy Council, after consultation with the Board of Trade, that the royal order must be obeyed, and that Dinwiddie was to sit and vote in the Upper House of the Assembly, and to serve as judge in the general court and the court of oyer and terminer.[5]

The surveyor-general was a revenue officer, and was therefore under the authority of the lords of the treasury as well as of the commissioners of the customs; he was required to get permission to go to England from one body or the other.[6] His reports were usually sent to the Board

[1] Plantations General, vol. xi, M. 44, August 8, 1733; Cal. St. P. Treas. Books and Papers, 1731–1734, pp. 93, 204, 456; Sainsbury, 1720–1730, p. 428.

[2] Journal of the Council of Virginia, MS., 1698–1703, p. 147; British Museum, King's MSS. no. 205, p. 493.

[3] Journal of the Council of Virginia, MS., 1705–1721, p. 219; 1721–1734, pp. 150, 252; Journal of the Board of Trade, vol. xxxix, pp. 29–30.

[4] Sainsbury, 1606–1740, pp. 145–146; Acts of Privy Council, Colonial, 1720–1745, no. 277.

[5] Journal of the Board of Trade, vol. li, p. 22; Acts of Privy Council, Col., 1720–1745, no. 537.

[6] Plantations General, vol. xviii, p. 213.

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of Trade, in addition to being forwarded to the treasury and to the custom-house.[7] Before the duty of one penny a pound on tobacco sent from one American colony to another was granted to William and Mary College, he had special charge of this revenue.[8] As the representative of the commissioners of the customs, he had general supervision of the royal collectors and the naval officers, and issued instructions to them, and his action in this regard could not be questioned by the governor or the Council.[9] In the absence of the surveyor-general, however, the governor might make a temporary assignment to a vacant collectorship. He was on some occasions consulted by the governor as to the appointment of certain officers whose duties pertained to revenue or trade.[10] He was, in fact, empowered to fill any office of the customs vacated for any reason, but was required to submit the name of the appointee to the commissioners of the customs and the lords of the treasury. Since the matters brought to the attention of the court of vice-admiralty affected trade and revenue, the names of those appointed to the admiralty courts were referred to him.[11]

The surveyor-general rendered the British government valuable service in examining the books and accounts of revenue officers, and in securing debts owed to the government by the collectors or others.[12] He explained, sometimes personally, to the Board of Trade the grounds upon which certain complaints were made to it in regard to laws affecting trade and revenue, gave the reasons for complaints against the governor, and furnished information on general colonial conditions.[13] His most valuable service, perhaps,

[7] Plantations General, vol. xix, p. 281; vol. xx, p. 333.
[8] Journal of the Board of Trade, vol. x, p. 219.
[9] Journal of the Council of Virginia, MS., 1705–1721, p. 249. Instructions to Earl of Orkney, March 22, 1728, in Sainsbury, 1715–1720, p. 442.
[10] Journal of the Council of Virginia, MS., 1705–1721, p. 148.
[11] Plantations General, vol. iv, 5, (ᵛ), 7.
[12] Journal of the Council of Virginia, MS., 1705–1721, pp. 118, 120; 1698–1703, p. 147; Cal. St. P. Col. 1689–1692, no. 2295; 1700, no. 906.
[13] Journal of the Council of Virginia, MS., 1698–1703, p. 146; Sainsbury, 1606–1740, pp. 96, 106.

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was in detecting and to some extent preventing piracy and illegal trade, and in forwarding to the commissioners of the customs lists of ships and an account of goods forfeited to the king for the violation of the acts of Parliament regarding trade.[14] His salary, which was paid out of the customs, by 1763 was £600 sterling a year.[15]

Searchers.—According to an act of Assembly of February, 1633, searchers were appointed "to search the ships and secret places of said ships, and to seize all concealed goods." They were to notify the governor and the Council of their action.[1] It seems that this office was discontinued, but the governor, seeing the need of an officer who would devote himself to preventing illegal trade, proposed to Colonel Robert Quary, the surveyor-general of the customs, the re-establishing of such an office in the lower district of the James River.[2] The commissioners of the customs, to whom the plan was referred, evidently acted favorably on the suggestion, for by 1714 there were searchers in addition to collectors and naval officers on the James and York Rivers and on the Eastern Shore, and also one in Lynnhaven Bay.[3] In making his report to the Board of Trade in 1763, Governor Fauquier stated that there were only two searchers in the colony, one in the lower district of the James River and one on the Eastern Shore, and he emphasized the importance of increasing the number, on account of the frequency of illegal trading.[4] The searchers were appointed by the surveyor-general of the customs.

While the surveyor-general of the customs rendered valuable service in preventing illegal trade, still, owing to the extensive area over which he exercised jurisdiction, it was essential that such an officer as the searcher should remain

[14] Plantations General, vol. iv, (1), pp. 5, 6; v, (2), November 5, 1700; February 13, 1701; November 17, 1701; vol. xxxi, p. 33.
[15] Fauquier to Board of Trade, in British Museum, King's MSS. no. 205, p. 493.
[1] Hening, vol. i, pp. 207, 213.
[2] Journal of the Council of Virginia, MS., 1705–1721, p. 148.
[3] Virginia Magazine of History and Biography, vol. ii, p. 2.
[4] British Museum, King's MSS. no. 205, p. 495.

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in the colony and perform this important duty for him. As to the salary of the searchers, it is known that about 1740 they petitioned the lords of the treasury for a salary of £40 a year, which had been promised each of them by the surveyor-general of the customs.[5] Later they were paid in fees alone.[6]

Auditor.—The duties of the auditor were at first performed by the treasurer of the colony. The office was established by the Assembly in 1664, with Captain Thomas Stegg, whose commission was confirmed by the king, as the first incumbent.[1]. This office was at first provincial in the sense that it was established by the Assembly and the incumbent thereof was compensated by that body, but from the beginning the royal approval was necessary to confirm the appointments.[2] The governor had a share in the appointive power to the extent of making recommendations for the auditorship, and in case of an emergency he might appoint a temporary incumbent.[3] Upon the death of the auditor in 1704, the governor (Nicholson) himself assumed the duties of this office, and served as auditor for nine months. He did not, however, serve in this capacity under a commission, but simply performed the duties instead of making a temporary appointment.[4] The governor had the power to suspend the auditor, subject of course to royal approval,[5] but could not

[5] Cal. St. P. Treas. Books and Papers, 1739–1741, p. 17.

[6] Dinwiddie Papers, vol. ii, p. 597, note.

[1] For a few years he was styled "auditor-general of Virginia" (Acts of Privy Council, Col. 1613–1680, no. 1309; Cal. St. P. Col. 1669–1674, nos. 104, 192, 195, 196, 696).

[2] Cal. St. P. Col. 1677–1680, no. 966; Virginia Magazine of History and Biography, vol. xiv, p. 270.

[3] Hartwell, Blair, and Chilton, p. 24; Cal. St. P. Col. 1677–1680, no. 1416; 1696–1697, no. 1320; Cal. St. P. Treas. Papers, 1714–1719, p. 281; Virginia Magazine of History and Biography, vol. xiv, p. 267; vol. xvii, p. 35.

[4] Journal of the Council of Virginia, MS., 1705–1721, pp. 3, 9; J. S. Bassett, ed., The Writings of Colonel William Byrd, introduction, p. 48.

[5] Blathwayt's Journal, vol. ii, p. 57; Cal. St. P. Treas. Papers, 1714–1719, p. 207; Cal. St. P. Col. 1669–1674, no. 696; Spotswood Letters, vol. ii, pp. 152, 159.

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grant him leave of absence, as it was necessary for the auditor to get permission from the lords of the treasury when he desired to leave the colony. The auditor was unquestionably a royal appointee, and held his commission under the great seal.[6] He was, after 1680, upon the appointment of the auditor-general of the colonies, the deputy of that official.[7] When the auditorship was established, it was stated that only councillors and those who had long resided in the colony were eligible to this office, and it seems that this principle was generally observed.[8]

For several years the auditor also performed the duties of the receiver-general, but by 1705 it was found advisable to separate these offices.[9] Nicholson told the Board of Trade that the auditor kept all the books and money of his office at his residence, which was not at the capital. He advised that these offices be separated, and both officers be required to live at the seat of government and to keep their records in the capitol. In regard to the conduct of the auditor while serving as receiver-general and the opportunities for fraud and deception, it was stated by an authority in 1698 that the auditor made up his account, and, "for fashion," laid it before the governor and the Council, "but nobody offers to say anything to it, it is by him transmitted to William Blath-

[6] The auditor and the secretary were for many years the only officers besides the governor who held commissions under the great seal (Acts of Privy Council, Col. 1613–1680, no. 1309; Journal of the Board of Trade, vol. iii, p. 75; vol. vi, p. 230; British Museum, King's MSS. no. 205, p. 493; Cal. St. P. Col. 1685–1688, no. 1551; Spotswood Letters, vol. i, p. 165).

[7] Journal of the Council of Virginia, MS., 1705–1721, pp. 3, 265; app., p. 52; 1721–1734, pp. 16, 302; Blathwayt's Journal, vol. i, p. 472; vol. ii, p. 167; British Museum, King's MSS. no. 205, p. 493; Dinwiddie Papers, vol. i, p. 390; Virginia Magazine of History and Biography, vol. iii, p. 122.

[8] Cal. St. P. Col. 1669–1674, no. 195; Virginia Magazine of History and Biography, vol. xiv, p. 270; Jones, p. 77; W. G. and M. N. Stanard, The Colonial Virginia Register, pp. 22, 45, 46, 47. A striking exception to this was, however, furnished in the case of Robert Ayleway, who was appointed by royal commission for life in 1677. He did not come to Virginia, but had Nathaniel Bacon, Sr., and later William Byrd, to serve for him.

[9] Spotswood Letters, vol. i, p. 7; Blathwayt's Journal, vol. ii, pp. 60, 378; Beverley, p. 196; Bassett, introduction, pp. 27, 49; Stanard, pp. 22, 45–47.

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wayt."[10] From 1677 to 1691 the auditor, in addition to serving in the capacities just mentioned, performed the duties of the treasurer of the colony.[11]

As the name of the office indicates, the auditor examined all the revenue accounts of the colony, except a few purely local ones under the supervision of the treasurer. Among these accounts were those of the royal collectors and naval officers, the quit-rents, the public claims, the fines and forfeitures. He swore to his accounts before the governor and the Council in April and October, and forwarded them through the auditor-general to the lords of the treasury.[12] The direct and careful supervising of these accounts by the lords of the treasury was shown in a letter from them to the auditor. He was instructed to send "authentic and sufficient vouchers for every particular payment" that was made by the receiver-general, by himself, or by any other person on warrants from the governor. He was to transmit "duplicates or attested copies of all original receipts, acquitances and papers" relating to the revenue.[13] Previous to about 1680 he was required to submit his report to the House of Burgesses before sending it to England, but Governor Culpeper discontinued this custom, thus drawing on himself the disapproval of the most influential men of the colony, who for many years expressed a desire to have the practice resumed.

The auditor not only examined the quit-rent accounts, but also, while serving as receiver-general, retained the money arising from this revenue, and paid it out on the order of the lords of the treasury, sent through the governor.[14] Until 1700 the quit-rents were usually paid in tobacco; after

[10] Hartwell, Blair, and Chilton, p. 59. William Blathwayt was auditor-general of the colonies.

[11] Blathwayt's Journal, vol. ii, p. 66.

[12] Ibid., vol. i, p. 51; vol. ii, p. 167; Journal of the Council of Virginia, MS., 1705–1721, pp. 19, 58, 91; Cal. St. P. Treas. Books and Papers, 1731–1734, pp. 403, 454; Cal. St. P. Treas. Papers, 1714–1719, p. 101.

[13] Blathwayt's Journal, vol. i, p. 171.

[14] Cal. St. P. Treas. Papers, 1714–1719, p. 109; Hartwell, Blair, and Chilton, p. 57; Cal. St. P. Col. 1681–1685, nos. 319, 1760; 1669–1692, no. 1003; 1693–1696, no. 534; 1697–1698, p. 758.

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that date they were also paid in money. The auditor was required by the governor and the Council to give directions to the sheriffs, in accordance with the royal instructions, for the sale of the quit-rent tobacco to the highest bidder at the county courts. This method was to supersede the former one of selling by "inch of candle."[15] That there was need for this change is shown by the fact that the quit-rents were on some occasions about 1700 sold privately to the governor and the councillors and to the auditor himself, who bought the most desirable of this tobacco for themselves. The auditor was thus treasurer and seller and buyer of the quit-rent tobacco.[16] He was expected to see that the government was not defrauded of this revenue. As late as the administration of Dinwiddie (1752–1758), the governor was careful to have patents for land taken to the auditor's office, where they were immediately put on the rent-roll, thus making more regular and certain the collection of the quit-rents.[17]

For a few years after the establishment of the office, the auditor received a salary from the Assembly;[18] later, he was paid a salary as a royal official of £100 a year out of the British treasury. His compensation was, however, largely in the form of a fee, which was gradually increased from three to seven and a half per cent of the revenue accounts audited, and amounted to about £400 a year.[19] This fee was again increased to ten per cent by the authority of the lords of the treasury, but by 1767 it was reduced to five per cent.[20] The auditorship was one of the few places of profit in the

[15] Cal. St. P. Col. 1699, p. 387; 1702, no. 895; Journal of the Council of Virginia, MS., 1705–1721, p. 12; Extra Session, December 11, 1723.

[16] Hartwell, Blair, and Chilton, pp. 56, 57; Cal. St. P. Col. 1696–1697, p. 610; Journal of the Board of Trade, vol. x, p. 216.

[17] Dinwiddie Papers, vol. ii, p. 269.

[18] Cal. St. P. Treas. Books and Papers, 1731–1734, no. 201; Cal. St. P. Col. 1669–1674, no. 195.

[19] Blathwayt's Journal, vol. ii, pp. 273, 469; Cal. St. P. Col. 1696–1697, no. 1320; Hartwell, Blair, and Chilton, pp. 57, 61; Virginia Magazine of History and Biography, vol. iii, p. 122.

[20] British Museum, King's MSS. no. 206, p. 249; Sainsbury, 1715–1720, p. 463; Blathwayt, Virginia Papers, MS.

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colony.[21] Governor Fauquier estimated in 1763 that the annual income of the office amounted to £800 sterling.[22] The auditor and the secretary were, in fact, the two principal officers in the colony, and in many respects were next in importance to the governor.[23]

Receiver-General.—As has been stated in connection with the auditorship, this office and that of receiver-general were originally combined. In 1705, on account of much criticism of the method of keeping accounts and uneasiness as to the possibility of fraud, the duties of the auditor were divided. On the death that year of William Byrd, the incumbent, Dudley Diggs was appointed auditor, and William Byrd, Jr., receiver-general.[1] The receiver-generalship was a royal appointment, and for many years this official held his commission under the sign manual of the king, or the signatures of the lords of the treasury by command of the king. By 1763 he was one of the few patent officers of the colony, and held his commission under the great seal.[2] The receiver-general gave a bond for £6000 to the lords of the treasury, with either a London merchant or some man of means in Virginia as security, and he was also required to furnish another bond for £6000 to the governor.[3] He obtained permission from the lords of the treasury when he wished to go to England, and submitted to their approval the deputy whom he appointed to serve during his absence.[4] By 1763 he had a regular deputy, who assisted him in the performance of his duties.[5] Those who filled the office of receiver-general were

[21] The secretary and the receiver-general were the other two (Sainsbury, 1706–1714, p. 154).

[22] British Museum, King's MSS. no. 205, p. 493.

[23] Sainsbury, 1625–1715, p. 215.

[1] Blathwayt's Journal, vol. ii, p. 378; Journal of the Council of Virginia, MS., 1705–1721, pp. 3–5, 29; Bassett, introduction, p. 49.

[2] British Museum, King's MSS. no. 205, p. 493; Blathwayt's Journal, vol. ii, p. 403; vol. iii, p. 141; Journal of the Council of Virginia, MS., 1705–1721, pp. 33, 265; Dinwiddie Papers, vol. i, p. 390.

[3] Journal of the Council of Virginia, MS., 1705–1721, app., p. 54; 1721–1734, pp. 16, 301; Blathwayt's Journal, vol. ii, p. 406.

[4] Journal of the Council of Virginia, MS., 1705–1721, p. 359; Journal of the Board of Trade, vol. xxiv, p. 111.

[5] Fauquier to Board of Trade, in British Museum, King's MSS. no. 205, p. 493.

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practically all councillors, for four of the five who served from 1705 to 1775 were members of the Council.[6]

The duties of the receiver-general included the receiving of the quit-rents, the revenue arising from the export duty of two shillings per hogshead on tobacco, the one penny per pound on tobacco exported from Virginia to any other English colony in America, the port duty, which was the revenue arising from the fifteen pence per ton on all vessels arriving in the colony, and all funds of the colony not received by the treasurer.[7] He kept an account of the sale of all rights for land, and received all forfeitures and escheats and the fines imposed by the general court and collected by the sheriffs.[8] The money arising from the sale of prize ships passed through his office, and the lords of the treasury required him to furnish an account of ships which had been seized and condemned for illegal trading.[9] He paid out of the revenue of two shillings per hogshead, on the order of the governor in Council, the salaries of the officers of the colony, also those of the auditor-general of the colonies and the solicitor of Virginia affairs, both of whom lived in England.[10] All the public expenses of the colony, except, of course, those paid out of the funds held by the treasurer, were paid out of the funds received in his office.[11] He was instructed to pay out money on warrant from the lords of the treasury or from the governor, but could pay out the quit-rents only on a royal warrant sent either directly to him or to the governor.[12] He of course reported to the lords of the treasury all payments made on the order of the governor.[13] The

[6] Stanard, p. 23.
[7] Hartwell, Blair, and Chilton, pp. 55–62; Journal of the Council of Virginia, MS., 1705–1721, app., p. 2; Beverley, p. 196.
[8] Journal of the Council of Virginia, MS., 1698–1703, pp. 72, 166, 168; 1705–1721, p. 29; 1721–1734, pp. 254, 302, 311; Dinwiddie Papers, vol. i, p. 21.
[9] Journal of the Board of Trade, vol. vi, p. 176; Blathwayt's Journal, vol. i, p. 504; Cal. St. P. Col. 1700, no. 326.
[10] Journal of the Council of Virginia, MS., 1698–1703, pp. 160, 167.
[11] Ibid., 1698–1703, pp. 42, 45.
[12] Ibid., 1705–1721, app., p. 2; Blathwayt's Journal, vol. ii, p. 295.
[13] Cal. St. P. Treas. Books and Papers, 1739–1741, p. 216.

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accounts of the revenues and the reports of disbursements forwarded to the lords of the treasury were certified to by the auditor and the governor, and sent by the governor.[14]

In remitting by bills of exchange the funds to be forwarded to England—the quit-rents, which had been paid in current money—the receiver-general was required to allow for the difference between colonial and sterling money. This difference varied, being at one time as much as forty-five per cent, but it was usually from fifteen to twenty-five per cent. The difference between the current money of the colony and bills of exchange was certified to by the Council upon the application of the receiver-general, in order that he might make up his accounts. The Assembly, also, from time to time determined the value of currency money.[15]

The receiver-general was paid for his services at first four per cent, then seven per cent, then five per cent, of the money passing through his office; at first this amounted to about £240 a year.[16] For furnishing on a certain occasion a complete roll of the quit-rents for a period of five years he received by warrant under the royal sign manual a compensation of £150.[17] Near the close of the colonial period,

[14] Cal. St. P. Treas. Books and Papers, 1735–1738, p. 519; 1739–1741, pp. 216, 264; Journal of the Council of Virginia, MS., 1705–1721, pp. 61, 127, 302; Dinwiddie Papers, vol. ii, p. 271; Blathwayt, Virginia Papers, MS.

[15] Journal of the Council of Virginia, MS., 1721–1734, pp. 59, 128, 457; Journal of the House of Burgesses, 1695–1696, p. 10; 1702–1705, p. 99; 1756–1758, p. 524; Hening, vol. iii, p. 502; vol. vi, p. 467; Acts of Privy Council, Col. 1745–1766, p. 390; 1766–1783, p. 384; G. L. Beer, British Colonial Policy, p. 179.

In the seventeenth century and also in the eighteenth century tobacco was used as currency. There were, however, some coins used in the seventeenth century, and by the beginning of the eighteenth there were, in addition to the English coins, Spanish, Portuguese, French, Dutch, Flemish, Mexican, and Peruvian coins in the colony. Inspectors of tobacco issued notes which served as currency. After 1755 paper money (treasury notes) was issued by the colony. In 1773 copper coins were struck off at the royal mint in England especially for use in Virginia.

[16] Blathwayt's Journal, vol. ii, p. 542; Dinwiddie Papers, vol. i, p. 390; Blathwayt, Virginia Papers, MS.

[17] Cal. St. P. Treas. Books and Papers, 1731–1734, p. 536.

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in 1763, the annual income of this office was estimated by Governor Fauquier at £800 sterling.[18]

Collectors of the Duty on Skins and Furs.—When William and Mary College was chartered in 1691, the Assembly imposed on skins and furs exported a duty which was appropriated to the support of that institution. The collectors of this duty were appointed by the governor; they accounted with the college, and received six per cent of this revenue for their services. They cooperated with the naval officers, who had charge of clearing ships, in order to guard against evasion of this duty.[1] When fraud was suspected, a collector was authorized to search a house or a ship for concealed skins or furs, and, with the assistance of the sheriff or constable, to seize them. One half was to be given to the college and the other half to the informer. Later on, the collector became entitled to the latter half. By 1734, on account of the opportunity for evasion of the duty on the frontier, justices of the peace, sheriffs, and constables were empowered to seize skins and furs in possession of travelers near the frontier, unless the owners could prove that they were inhabitants of the colony and would also take an oath not to evade the duty should they decide to export. By 1759, however, the duty was evaded, especially by "pedlars" on the frontier, and a law was passed by the Assembly requiring every "pedlar" or trader to obtain a license from a collector "residing near the frontier." In addition to the collectors at the ports, there were thus, by 1759, collectors of this revenue stationed on the frontier. These additional collectors accounted with the college and received ten per cent for their services. They were empowered, in addition to granting licenses to traders, to take a bond of £20, with security, from each of them, to insure compliance with the laws regarding this duty.[2]

[18] Fauquier to Board of Trade, in British Museum, King's MSS. no. 205, p. 493.

[1] Hening, vol. iii, pp. 63, 123, 356; vol. iv, p. 431; vol. vi, p. 91; vol. viii, p. 142.

[2] Ibid., vol. vii, p. 283. Fees for license: £3 for the college, 20s. for the governor, and 20s. for the collector

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Collectors of the Duty on Liquors.—The collectors of the duty on imported liquors were appointed in 1691 by the governor to collect this duty from merchants or others receiving spirituous liquors, wines, or beer. They accounted twice a year, April and October, with the treasurer of the colony, who reported to the Assembly. At first they were allowed ten per cent for their services, but in 1699 this was reduced to six per cent. A collector in each of the six revenue districts cooperated with the royal collectors and naval officers there in seeing that no ship was permitted to land liquors until it had been duly registered. They were empowered to go on board a ship and seize any liquors on which the duty had not been paid, and to take forcible possession of any such liquors if landed and concealed.[1] By 1736, on account of the evasion of this duty by the importing of liquors by land from the adjacent colonies, the collectors were authorized by the Assembly to collect the same duty on importations by land. This seems to have been done with the assistance of deputies, and was evidently effective, as no further reference to this matter is found in the acts of Assembly.[2]

A master of a ship or an importer making a false entry as to liquors was fined £100. A collector who connived at such fraud or accepted a bribe was fined £100, and was debarred from holding any office connected with the customs. Any one who should bribe a collector was also to be fined £100. The granting to William and Mary College of a part of the revenue arising from the duty on liquors did not affect the relation of the collectors to it.

Collectors of the Duty on Slaves.—From 1699 to 1738 the collectors of the duty on slaves were appointed by the governor; they accounted with the treasurer of the colony, who in turn reported to the Assembly. These collectors were allowed at first six per cent, later ten per cent, for their services. When the duty was changed in 1732 to a per-

[1] Hening, vol. iii, pp. 23, 88, 129, 189, 229; vol. iv, pp. 144, 469; vol. v, p. 310; vol. vii, p. 265.
[2] Ibid., vol. iv, pp. 146, 470.

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centage on the purchase price of each slave, the importer was required to pay the duty to the collector within forty days; if he failed to do this, he forfeited £5 for every slave on whom the duty had not been paid. A shipmaster making a false entry as to slaves imported was fined £100, and a collector who accepted a bribe and the one who offered it were each fined £100.[1] By 1738 every importer of slaves was constituted a collector, and the regular collectors were thus superseded. In most cases the importation of slaves was by water, but by this time some were brought into the colony by land, and those receiving them were of course required to pay the duty.[2] Should a person not a resident of the colony wish to obtain slaves to sell, he was required, whether they were imported by water or by land, to pay the duty to the naval officer, who accounted with the treasurer. Later, however, the seller of slaves was also empowered to receive the duty from non-residents, and to account with the treasurer.[3] As the purchaser within the colony was allowed forty (later thirty) days in which to make payment, the seller was required to furnish the treasurer with an account of each sale, together with the name of the purchaser and the price of the slave. If the seller took a promissory note, this was also handed to the treasurer, who thereupon informed the sheriff of the county in which the sale occurred, and he collected the duty. Thus by 1752 the seller, the treasurer, and the sheriff had really taken the place of the former collectors. The sheriffs accounted annually with the treasurer for the duty and received six per cent for their services. If the purchaser so desired, he might pay the seller, who accounted with the treasurer and received six per cent for his services. By 1759 it was found necessary to require every importer of slaves from the West Indies, Maryland, Carolina, or any other American colony to take an oath before the clerk of the county court of his county as to the slaves disposed of,

[1] Hening, vol. iii, pp. 193, 233, 346, 492; vol. iv, pp. 317, 472; vol. v, p. 28; vol. vi, pp. 218, 419, 466; vol. vii, p. 81; vol. viii, p. 532.
[2] Ibid., vol. v, p. 28.
[3] Ibid., vol. vi, p. 217.

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and the clerk furnished the treasurer and the sheriff with this information.[4]

Collectors of the Duty on Servants.—The duty on servants imported, laid in 1699 but not mentioned in the acts of Assembly after 1710, was received by collectors appointed by the governor. These officers were paid six per cent for their services, were stationed in the six revenue districts of the colony, and cooperated with the naval officers in preventing the evasion of the duty when ships landed. They accounted with the treasurer.[1]

The duties on liquors, on slaves (until 1738), and on servants (until discontinued) were received by one collector only in each of the six revenue districts of the colony, and not by three collectors. The methods of collecting these revenues have been discussed separately in order to make clear the changes which took place.[2]

Treasurer.—The office of treasurer was one of the very earliest in the colony. Before 1624 the treasurer was appointed by the London Company, and from 1624 to 1691 by the king, his commission bearing the royal sign manual.[1] From April, 1691, he was appointed by the Assembly.[2] In case of emergency, however, the governor could make a temporary appointment until the next meeting of the Assembly.[3] Before 1699 the treasurer was usually a member of the Council, but after that date his interests were with the burgesses. After 1691 he was practically the agent of the House of Burgesses, and the representatives of the people

[4] Hening, vol. vii, p. 338.

[1] Ibid., vol. iii, pp. 193, 197, 346, 492; Journal of the House of Burgesses, 1702–1705, pp. 59, 120.

[2] Journal of the House of Burgesses, 1705–1706, p. 160; 1710–1712, pp. 270, 284; 1712–1714, p. 38.

[1] Cal. St. P. Col. 1675–1676, no. 346; 1677–1680, nos. 320, 377, 738; Virginia Magazine of History and Biography, vol. xiv, p. 267; Stanard, p. 7.

[2] Hening, vol. iii, p. 92; vol. v, p. 64; vol. viii, p. 211; British Museum, King's MSS. no. 205, p. 509; Cal. St. P. Col. 1689–1692, no. 2284; Stanard, pp. 42, 43, 45.

[3] Hening, vol. iii, p. 198; vol. vi, p. 196; vol. viii, p. 212.

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were very jealous of keeping entire control of this office. He was independent of the auditor and the receiver-general, who were appointees of the crown. For a period of fourteen years (1677–1691), however, the office of treasurer was, from motives of economy, united by the governor and the Council with that of the auditor.[4] In the early part of the seventeenth century, and even as late as 1664, the duties afterwards assigned the receiver-general, such as receiving quit-rents and other royal fees and profits, were performed by the treasurer in addition to the usual services rendered by him.[5] From 1691 he was the appointee of the House of Burgesses, and for a period of sixty-seven years (1699–1766) the duties of the treasurer were performed by the speaker of the House.[6]

This close relation between the House of Burgesses and the treasurer resembled somewhat the position of the English chancellor of the exchequer in the House of Commons. The combination proved a failure, and upon the death in 1766 of John Robinson, who had served for a period of twenty-eight years, the offices were separated.[7] The House of Burgesses, on account of the opportunity for fraud afforded by the union of these offices, decided to separate them, but was not forced to do so by the British government. Governor Dinwiddie complained of this dual office, but nothing seems to have been done to compel the House to make the change.[8]

[4] This was during the period of royalist reaction, after the Cromwellian period (Blathwayt's Journal, vol. ii, p. 66; Hartwell, Blair, and Chilton, p. 61).

[5] Hening, vol. ii, pp. 31, 83, 99.

[6] Ibid., vol. iii, pp. 197, 199, 476, 481, 495; vol. iv, pp. 135, 142, 150, 433; vol. v, pp. 64, 173; vol. vi, p. 248; vol. vii, p. 466; vol. viii, p. 210.

[7] This was after the administrators of his estate had turned over to his successor £5607. 3s. 11d. due by him on the revenue from the duty on liquors and slaves, and £2500 of money appropriated for the Indian trade. As there were no banks in which to deposit the public funds, it was customary for the treasurer to lend the money to individuals. Robinson made bad loans to personal and political friends, and this seriously involved his estate.

[8] When the House sent Peyton Randolph to England in 1754 to protest against the pistole fee imposed by Dinwiddie, and when it granted him £2500 for his services and delegated him to appoint a

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The usual duties of the treasurer were to receive the revenues arising from the duties on liquors, servants, and slaves imported, from the public levy, and from any special levy raised by act of Assembly, and to borrow money on the authority of that body.[9] Before 1691 he was dependent upon royal order in disposing of the funds entrusted to him, but after that date he accounted to the Assembly for all money received by him, and paid it out by order of that body or by warrant issued by the governor. His account, after being approved by the Assembly and signed by the governor, was sent to the auditor-general of the colonies.[10] It was thus the policy of the British government to supervise the whole revenue system of the colony, although the funds handled by the treasurer were considered to belong to the province, and to be, therefore, not under direct royal control. He was empowered by the Assembly to emit treasury notes on special occasions, such as the preparation for the French and Indian War, when extra funds were needed.[11] He was directed to prosecute any one refusing to pay the duties usually received by him, and to force payment of the duties on liquors and slaves by compounding the penalties inflicted for refusal or neglect.[12]

An act of Assembly of November, 1645, provided that the quit-rents were to be applied first to the payment of the treasurer's salary of £500 a year, the surplus to be disposed of by the Assembly.[13] This was done with the approval of the British government, as the treasurer was then a royal official. After 1691, when the treasurer was appointed by

regular agent for them in England, with an annual salary of £200, the treasurer-speaker agreed to pay these amounts out of the funds in his hands, notwithstanding the strong protest of Dinwiddie and the Council (Dinwiddie Papers, vol. i, p. 160).

[9] Hening, vol. iii, pp. 92, 495; vol. iv, 135, 148, 433; vol. v, 173; vol. vi, 195, 218; vol. vii, 466; Beverley, p. 197.

[10] Hening, vol. iii, p. 495; vol. vi, p. 195; Calendar of Virginia State Papers, vol. i, pp. 30, 74, 113; Dinwiddie Papers, vol. ii, pp. 490, 591; Cal. St. P. Col. 1677–1680, nos. 320, 332, 737; Blathwayt, Virginia Papers, MS.

[11] Hening, vol. vi, pp. 467, 528.

[12] Ibid., vol. iv, p. 473; vol. v, p. 336.

[13] Ibid., vol. i, p. 306.

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the House of Burgesses, he was paid six per cent on the money passing through his office. This percentage was later reduced to five. By 1734 he was also being paid £50 a year, which was gradually increased to £150, for auditing and settling the accounts of the inspectors of tobacco. He was required to furnish a bond of £5000 sterling, which was by degrees raised to £100,000.[14] The governor was to state his approval of the security furnished by the treasurer and to administer the oath of office to him.

There was little in common between the office of lord high treasurer and that of treasurer of Virginia. Both officials, of course, were custodians of public funds, but as far as the administration of the two offices was concerned, there was not much similarity, except that previous to 1691 the treasurer of Virginia, like the lords commissioners for executing the office of lord high treasurer, was appointed by the king.[15]

Inspectors of Tobacco.—The cultivation of tobacco was the principal occupation of the colonists, and notwithstanding the attempts of the British government to divert the attention of some of them from this to other products, tobacco continued to be raised.[1] In 1622, 60,000 pounds of tobacco were shipped to England;[2] by about 1700, 40,000 hogsheads containing 27,200,000 pounds were exported from Virginia every year,[3] and in 1743 the amount exported was 35,000 hogsheads. It was estimated that in 1747 Virginia and Maryland together exported 70,000 hogsheads.[4] Warehouses, established by act of Assembly for the storage of all tobacco, whether for sale, for monetary purposes, or for export, were first built in 1632, and were always located conveniently to the wharves. They were

[14] Hening, vols iii, pp. 92, 476; vol. iv, pp. 135, 433; vol. v, pp. 64, 173; vol. vi, pp. 195, 248; vol. vii, pp. 33, 242, 467; vol. viii, p. 212.
[15] Sir W. R. Anson, The Law and Custom of the Constitution, pp. 163–164.
[1] Bruce, Economic History of Virginia, vol. ii, p. 413; Andrews, Colonial Self-Government, p. 317.
[2] Bruce, Economic History of Virginia, vol. i, p. 263.
[3] Journal of the Council of Virginia, MS., 1721–1734, p. 84.
[4] C. O. 5: 5, 202; C. Campbell, History of the Colony and Ancient Dominion of Virginia, p. 444.

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privately owned, but were maintained at the public expense, the rent of them ranging from £5 to £50 a year. In 1742, in the case of most of them, the rent was changed to eight pence on every hogshead of tobacco. In 1769 this was raised to ten pence.[5]

The inspectors of the tobacco which was brought to these public warehouses were at first members of the Council, who were assisted by the commissioners of monthly courts, but later were appointees of the governor.[6] By 1738 the county courts of the counties in which public warehouses were located recommended annually four suitable persons, from whom were selected two for each warehouse. The recommendation by the county court was not essential, for an appointment might be made by the governor without it.[7] There were usually two inspectors for each warehouse; in 1732 there were altogether seventy-one warehouses and one hundred and thirty-three inspectors, increased by 1765 to ninety-eight warehouses and one hundred and sixty inspectors.[8] By 1761 "additional" inspectors were appointed, who were to serve only when the two regular inspectors did not agree as to the quality of tobacco, or when one of them was absent, or when they brought their own tobacco for inspection.[9] The duties of the inspectors were to break open, "view and examine" all hogsheads of tobacco, to see if the tobacco was in good condition and "merchantable," to weigh it, and to stamp the hogshead.[10] They collected the special tax of two shillings on every hogshead of

[5] Hening, vol. i, p. 204; vol. iv, pp. 254, 382, 479; vol. v, pp. 14, 145; vol. vi, pp. 177, 223, 352; vol. vii, pp. 245, 532; vol. viii, pp. 80, 324; Journal of the Council of Virginia, MS., 1721–1734, pp. 449, 451; Webb, p. 330.

[6] Hening, vol. i, p. 211; vol. iv, p. 251.

[7] Journal of the Council of Virginia, MS., 1721–1734, pp. 408, 471; Hening, vol. v, pp. 10, 11, 129; vol. vi, p. 159; vol. viii, p. 86; Calendar of Virginia State Papers, vol. i, p. 233; Warwick County, Court Minutes, 39.

[8] Hening, vol. iv, pp. 266, 334, 382; vol. v, p. 144; vol. vi, p. 175; vol. viii, p. 97; Journal of the Council of Virginia, MS., 1721–1734, p. 440.

[9] Hening, vol. vii, p. 387; vol. viii, pp. 87, 89, 234.

[10] Ibid., vol. iv, p. 251; vol. vi, p. 162.

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tobacco received at their warehouses, which was imposed at the time of the French and Indian War.[11] They were required to take an oath for the faithful performance of these duties, and to furnish the governor with a bond of £1000. This was reduced in 1742 to £200, but was increased in 1748 to £500.[12]

The salary of the inspectors was at first small, but from about 1680 to 1732 each received £60 a year. After 1732 it ranged from £25 to £70 a year, and was specified by act of Assembly for the several warehouses according to their importance.[13] After deducting their own salary, the rent of the warehouse, and incidental expenses, inspectors accounted annually with the treasurer, by whom the account was reported to the Assembly, for the inspection fee of five shillings paid on every hogshead by the person to whom it was delivered. They reported to the county court the disposition of all tobacco committed to their custody, and also made an annual report to the commissioners of the customs of all tobacco inspected, its disposal, if it was exported, by what ship, and by what naval officer it was despatched.[14]

Any one wishing to pay any public or private debt could get from the inspectors notes to the value of his tobacco in the warehouse. These notes, known as "crop notes" and "transfer notes," were used as legal tender. They were usually current only in the county where they were issued, but passed occasionally in an adjacent county provided the counties were not separated by a very wide river. They were payable on demand by the inspectors who signed them,

[11] Hening, vol. vii, p. 333; vol. viii, p. 110. This was in addition to the duty of two shillings on every hogshead, paid to the royal collectors at the ports.

[12] Ibid., vol. iv, p. 261; vol. v, p. 130; vol. vi, p. 161; vol. viii, p. 88.

[13] Ibid., vol. iv, pp. 262, 334, 385; vol. v, pp. 144, 325; vol. vi, pp. 175, 352, 473; vol. vii, p. 532; vol. viii, pp. 97, 323, 508. In 1755 and in 1758, on account of the small tobacco crops, the inspectors received instead of their usual salaries three shillings a hogshead on "crop tobacco," and five shillings on "transfer tobacco" (ibid., vol. vi, p. 567; vol. vii, p. 244).

[14] Ibid., vol. iv, pp. 252, 260; vol. v, pp. 125, 158; vol. vi, pp. 155, 190, 224; vol. viii, pp. 70, 82, 95, 324.

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within one year, after which time they were not legal tender.[15]

Inspectors while in office and for two years afterwards were ineligible to membership in the House of Burgesses, and could take no part in elections, under a penalty of £50. The reason for this is indicated in the preamble of the law passed in 1736: "Whereas divers inspectors have busied themselves in the election of burgesses, and used the power of their offices, in influencing such elections, as well for procuring themselves, as others, to be elected, to the hindrance of the freedom of voting," and so on.[16] In the effort to prevent fraud on the part of inspectors, it was specified by an act of Assembly in 1738 that no inspector should be a collector of quit-rents or of any public, county, or parish levies, or of any officers' fees.[17] This law was repealed in 1752, but reenacted in 1765.[18] That the colonists sometimes purchased this office may be inferred from the act of Assembly, passed in 1748, to prevent the buying or selling of the office of inspector, and fixing the penalty at £100 fine and ineligibility to the office.[19] It seems that it was necessary further to check the tendency toward fraud by enacting a law prohibiting an inspector from accepting any gift or gratuity other than his salary, under a penalty of £50. It was also provided that no inspector should buy, sell, or exchange any tobacco in his warehouse. In 1742 justices of the peace were empowered to visit warehouses to ascertain if the inspectors were faithfully discharging their duty, and to report any irregularity to the governor.[20]

That some planters evaded the law and disposed of their tobacco without having brought it to the public warehouse

[15] Hening, vol. iv, pp. 251, 254, 386; vol. v, pp. 133–138; vol. vi, pp. 163, 168, 256, 475; vol. viii, pp. 90–104; Webb, p. 336. First mentioned in acts of Assembly of May, 1730.

[16] Hening, vol. iv, p. 481; vol. v, p. 153; vol. vi, p. 185; vol. vii, p. 529; vol. viii, pp. 95, 316.

[17] Ibid., vol. v, pp. 11, 153; vol. vi, p. 185.

[18] Ibid., vol. vi, p. 226; vol. viii, p. 95.

[19] Ibid., vol. vi, p. 160; vol. viii, p. 87.

[20] Ibid., vol. iv, p. 263; vol. v, pp. 154, 158; vol. vi, pp. 160, 185; vol. viii, p. 95.

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is evident from a law passed in 1738 requiring inspectors, sheriffs, and constables to take an oath in the county court to report to the justices of the peace all cases of such violation, or of tobacco carried to Maryland or North Carolina without a permit.[21] The master of every ship was required to take an oath before a naval officer that he would not permit any uninspected tobacco to be taken on board, under penalty of a fine of £20 and forfeiture of the tobacco. He was to furnish the naval officer with two manifests of all tobacco on board, one of which was annexed to the clearance certificate to be delivered by the master of the ship to the customs official at his destination, and the other was sent to the customs official by the naval officer.[22]

Pilots.—The pilots of the ships on the larger rivers and Chesapeake Bay were appointed by the governor.[1] The act of Assembly of 1661 establishing a system of pilots was from time to time reenacted for periods of from three to seven years, and the governor was empowered to make appointments. By 1762 the county court of each of the maritime counties had been empowered to name three men, who examined all persons applying for positions as pilots and made the appointment.[2] The penalty for acting as pilot without a commission was a fine of £10 for the first offense, increased to £20 and £40 for second and third offenses.[3]

The duties of the pilots were to keep themselves in readiness to render the necessary aid in piloting ships on the rivers and the bay, and to provide beacons. For the latter service they were paid by the Assembly. For conducting a merchant vessel the pilot was paid the specified fees by the master of the ship, but in case of ships of war or other vessels of the British government, he applied to the Council

[21] Hening, vol. v, pp. 13, 151; vol. vi, p. 183; vol. viii, p. 75.
[22] Ibid., vol. v, p. 141; vol. vi, p. 157; vol. viii, p. 72.
[1] Journal of the Council of Virginia, MS., 1692–1693, p. 139; 1705–1721, p. 100; Cal. St. P. Col. 1689–1692, no. 1845; 1693–1696, no. 21.
[2] Hening, vol. ii, p. 35; vol. vi, p. 490; vol. vii, p. 580; vol. viii, pp. 197, 353, 542.
[3] Ibid., vol. vi, pp. 490–493; vol. vii, p. 581.

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for compensation.[4] The fees to be charged were specified by act of Assembly for every stretch of the rivers and the bay where guides were needed.[5] The services rendered by the pilots were recognized as quite valuable, especially those in connection with the merchant vessels, which were closely related to the revenue system of the colony.[6]

Postmaster.—Before 1692, postal affairs in America were left to the colonies themselves, but with very unsatisfactory results. On February 17, 1692, Thomas Neal was authorized by letters patent under the great seal to have charge for twenty-one years of the administration of the postal affairs in all the colonies on the mainland of North America and the adjacent islands. He did not personally perform the duties of this office, but nominated as his deputy Andrew Hamilton of East Jersey, who was commissioned by the postmaster-general of England in pursuance of a royal order. Andrew Hamilton commissioned Peter Heyman to serve as his deputy in Maryland and Virginia. Heyman presented his commission to the governor and Council of Virginia, whereupon a proclamation was issued to make known the royal pleasure and to assure Heyman of the cooperation of the colony.[1] The Council, with the House, passed an act[2] which acknowledged that the act of Parliament establishing the post-office was to be enforced in the colony, but it was not enforced for several years. There was objection to the royal postal system in the colony, and it was not until 1718 that the post-office was actually established in Virginia. Spotswood in a letter to the Board of Trade

[4] Journal of the Council of Virginia, MS., Extra Session, October 23, 1722.

[5] Hening, vol. ii, p. 35; vol. vi, p. 490; vol. vii, p. 580. From Cape Henry or Lynnhaven Bay to Hampton Roads or Sewell's Point, £1; Cape Henry to Smith's Point on Potomac River, £5. Other points on the bay, and on the James, York, Rappahannock, and Potomac Rivers are also mentioned, with the fees to be charged.

[6] Journal of the Council of Virginia, MS., 1705–1721, p. 110.

[1] Ibid., 1692–1693, p. 135; Sainsbury, 1691–1697, pp. 112, 147; Virginia Gazette, April 21–28, 1738.

[2] Hening, vol. ii, p. 112.

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of June 24, 1718, said: "The people were made to believe that the Parliament could not lay any tax (for so they call the rates of postage) here, without the consent of the General Assembly." He also referred to the rates of postage as "this branch of the king's revenue."[3] One of the declared purposes of the new postal law of 1710, passed by Parliament, was to raise a war revenue, and a weekly payment of £700 had to be made to the royal treasury. The people of New England did not object to this regulation,[4] but the Virginians held that Parliament could not thus tax them without their consent. It seems, however, that this opposition gradually declined, for after 1718 they apparently raised no objection to the postal system on this ground.

The instructions to the governor informing him of the appointment of Neal stated that letters and parcels were to be transmitted "under such rates and sums of money as the planters shall agree to give, or as shall be proportionable to the rates for the carriage of letters ascertained in the act of Parliament for erecting and establishing a post office."[5] In March, 1692/3, the Virginia Assembly fixed the rates of postage; these became effective as soon as the colony submitted to the postal system, which was about 1718.[6] Mer-

[3] Spotswood Letters, vol. ii, p. 280.
[4] E. B. Greene, Provincial America, p. 41.
[5] Journal of the Council of Virginia, MS., 1692–1693, p. 135.
[6] Hening, vol. iii, p. 112; Regulations of the Colonial Post Office, MS.

Letter of one sheet, distance not over 80 miles	3d.
" " two sheets, " " " "	6d.
" " one sheet, " over " "	4d.
" " two sheets, " " " "	9d.
Every additional sheet for any distance	5d.
Writs, deeds, etc., per ounce, not over 80 miles	12d.
" " " " " over 80 miles	18d.

The rates were later increased as follows:—

Letter of one sheet, distance not over 60 miles	4d.
" " two sheets, " " " " "	8d.
" " three sheets, " " " " "	1s.
" " one sheet, " " " 100 "	6d.
" " two sheets, " " " " "	1s.
" " three sheets, " " " " "	1s. 6d.

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chants' accounts, bills of lading, and bills of exchange were considered double letters, but this system of rates did not prevent merchants from sending letters by shipmasters. The official letters of the colony were, of course, exempted from postage. Writs of courts and letters which the writers preferred to despatch privately did not have to be sent through the post-office.

When the post-office was in actual operation in the colony, the irregularities were so pronounced that the Assembly passed an act complaining of them. It was charged that the postmaster, knowing that the post-office was at a great distance from many people, had taken possession of letters from masters of ships and kept them for several months. The commission to Neal had specified that he or his deputy should establish at Neal's expense post-offices in each county, but this was not done. It was also charged that the postmaster took from ships other letters, intended to have been delivered directly to the addressees and not to have passed through the post-office, and not only required postage for them, but also opened them and in some cases took money from them. The Assembly sought to remedy these irregularities by ordering masters of ships to furnish to the postmaster a list of letters, giving the address of each, to serve as a guarantee of their safe delivery. An authority on conditions in the colony, writing in 1724, said: "The last thing I shall mention with regard to the advantage of trade in Virginia, is the absolute necessity of a better regulation of the post office there, for the safe and quicker conveyance of letters."[7] In 1738 Ex-Governor Spotswood, then

From New York (main office in America) to Williamsburg (main office in Virginia):—

Letter of one sheet	1s.	3d.
" " two sheets	2s.	6d.
" " three sheets	3s.	9d.

From New York to London:—

Letter of one sheet	1s.
" " two sheets	2s.
" " three sheets	3s.

[7] Jones, p. 150.

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postmaster-general of the American colonies, improved the system by the use of stages. He arranged the longer routes in relays, so that one postman did not travel the whole distance, but was relieved at a certain point. This plan was adopted on the route between Williamsburg, Virginia, and Philadelphia. The stage route between Williamsburg, Virginia, and Edenton, North Carolina, furnished a monthly mail service.[8]

In addition to the usual duties of the postal service, the postmaster was to have been given the general supervision of the ferries.[9] The governor, on July 24, 1695, in calling the attention of the Council to the post-office, stated that it had not been put on a firm basis in the colony, nor had the ferries, which were vested in the postmaster. Hening's statutes covering the period from 1692 to 1775 show, however, that the ferries were established by the Assembly, that the fees were also fixed by this body, and that the ferry keepers were appointed by the Assembly and later by the county court.[10] Thus the royal power, represented by the postmaster, did not extend, as was evidently intended, to the ferries. The postal system of the colony, on the other hand, was under royal supervision, and the postmaster-general in England sent from time to time, in addition to the instructions to his deputy in the colony, certain directions to the governor, by whom reports were made regarding postal affairs to the lords of the treasury.[11]

English Merchants.—The policy adopted by Charles II in regard to the colonies was largely influenced by the merchants of London, who desired the cooperation of the government in their plans to profit by trade with America. Martin Noell and Thomas Povey, two wealthy and in-

[8] Virginia Gazette, April 21–28, 1738.
[9] Cal. St. P. Col. 1693–1696, no. 1975; Sainsbury, 1691–1697, p. 147.
[10] Hening, vols. iii–viii. In 1705 there were 50 ferries, and in 1748 there were 110.
[11] Cal. St. P. Treas. Papers, 1697–1701, pp. 289, 513; Sainsbury, vol. iii, p. 776; Journal of the House of Burgesses, 1702–1705, pp. 21, 52, 72.

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fluential London dealers, controlled a group who about 1660 and later endeavored to monopolize the trade with America and the West Indies, and exerted no small influence over colonial affairs.[1] Merchants were frequently in attendance at the meetings of the Board of Trade, and had much power, not only in regard to appointments, but also as to many matters of concern to the colony.[2] In 1752 they objected to the proposed lighthouse at Cape Henry, on account of the tax on ships which would be levied to pay for it. The act of the Virginia Assembly for this purpose was repealed by order of the king, and it was not until 1772 that the lighthouse was established.[3] Since certain dealers shipped liquor and slaves to the colony, it was but natural that they should petition the Board of Trade against the duties imposed in Virginia on these imports.[4] The influence of the merchants was recognized by certain men in the colony who desired endorsement by them of their petitions to the Board of Trade.[5] By means of bills of exchange on London merchants the governor paid the solicitor of Virginia affairs in London, and discharged other public and private obligations.[6]

Micajah Perry, another London merchant, is a striking example of the influence which the English traders exerted in the affairs of the colony. He was at one time solicitor of affairs for Virginia and Maryland.[7] Later, when not serving in this capacity, he was instructed by the receiver-general, upon an order of the Council, to reimburse the solicitor of Virginia affairs for expenditures in the interest of the colony, and to "advance, from time to time, what he shall hereafter have occasion for in his negotiations."[8]

[1] C. M. Andrews, "British Committees, Commissions, and Councils of Trade and Plantations," in Johns Hopkins University Studies, ser. xxvi, nos. 1–3, pp. 49–55.
[2] Journal of the Board of Trade, vol. xix, pp. 277, 394; vol. xxx, pp. 356, 468.
[3] Ibid., vol. lxvii, p. 3; vol. lxviii, p. 190; Hening, vol. viii, p. 539.
[4] Journal of the Board of Trade, vol. xxxiv, p. 2.
[5] Ibid., vol. xlii, p. 73.
[6] Dinwiddie Papers, vol. i, p. 252; vol. ii, pp. 50, 277.
[7] Cal. St. P. Col. 1696–1697, no. 1157; 1701, nos. 184, 766.
[8] Journal of the Council of Virginia, MS., 1705–1721, p. 117.

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He recommended prospective councillors to the Board of Trade, and was frequently summoned by that body to give his opinion on laws of Virginia affecting trade. He furnished the colony with certain stores, presented to the commissioners of the prize office the request of the agent of prizes in Virginia for special compensation, and for service rendered the colony was paid in bills of exchange drawn by the governor.[9] He was on the bond of William Byrd, the receiver-general, for £10,000, and later on that of another receiver-general, John Grymes, for £6000.[10] He used his influence with the auditor-general of the revenues to have Philip Ludwell appointed auditor of Virginia.[11] He and his brother Richard offered a petition in behalf of William Byrd, the receiver-general, for the renewal of his appointment.[12] He kept in constant communication with William Byrd, on certain occasions paid money into the exchequer on instructions from him,[13] and once petitioned the lords of the treasury for an increase of Byrd's salary from four to five per cent.[14] In 1705 the receiver-general of Virginia, by order of Council, remitted to Micajah Perry and Company a bill of exchange for £1669, which was the amount of the quit-rents for 1704.[15] He had a brother who was a merchant in York County, Virginia, and a nephew who was a merchant in Charles City County.[16] His interest in colonial affairs was not confined to Virginia, and on one occasion he furnished the colony of New York with £8000.[17] That he had much influence with British officials, and played

[9] Journal of the Council of Virginia, p. 36; Journal of the Board of Trade, vol. xii, p. 147; Cal. St. P. Col. 1699, no. 1050; Virginia Magazine of History and Biography, vol. iii, p. 232.

[10] Cal. St. P. Treas. Books and Papers, 1729–1730, no. 666; Blathwayt's Journal, vol. ii, p. 360; Journal of the Council of Virginia, MS., 1705–1721, app., p. 54.

[11] Virginia Magazine of History and Biography, vol. iv, pp. 15, 16, 20.

[12] Cal. St. P. Treas. Papers, 1714–1719, p. 91.

[13] Cal. St. P. Treas. Papers, 1708–1714, p. 151.

[14] Blathwayt's Journal, vol. ii, p. 541.

[15] Virginia Magazine of History and Biography, vol. xvi, p. 73.

[16] William and Mary College Quarterly, vol. xvii, pp. 264, 265.

[17] Cal. St. P. Treas. Papers, 1708–1714, p. 151.

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an important part in the affairs of the colony, is thus quite apparent.

Certain merchants occupied in some instances an intermediate position between the governor and the British authorities. Regarding supplies of various kinds furnished by Dinwiddie to the military company ordered to Virginia by the British government, Dinwiddie wrote to Messrs. J. and C. Hanbury, London merchants, as follows: "I must beg you to apply to the secretary of state and the secretary of war, to qualify me to draw for reimbursement."[18] The next year, 1755, in a letter to the secretary of state he said: "Agreeable and in obedience to his majesty's commands, I have transmitted my warrant to the paymaster general of the army, for £2000, payable to Mr. J. Hanbury, from the revenue of two shillings per hogshead on tobacco."[19] On other occasions the same merchant transacted business for Dinwiddie. The following incident will help to show the several governmental services rendered. In 1754 Dinwiddie wrote to the secretary of the Board of Admiralty: "I desire you will send me thirty passes, and Mr. John Hanbury will pay you for those you last sent me."[20] A letter to the Earl of Grenville, the proprietor of North Carolina, regarding a sum of money forwarded to him by his agent in North Carolina through Dinwiddie, makes this statement: "I enclose your lordship my own draft on Messrs. J. and C. Hanbury for £429."[21]

The British government thus recognized the important part which the merchants had in the development of the colonial trade, and also in the actual administration of affairs. A striking example of the encouragement given by it to these men is shown in the clause in the instructions to the governors of Virginia from Culpeper (1682) to Dunmore (1771) directing them to render assistance to mer-

[18] Dinwiddie Papers, vol. i, pp. 252, 337; vol. ii, p. 271. He was reimbursed out of the two shillings per hogshead revenue the £1040 which he had expended.
[19] Ibid., vol. ii, p. 50.
[20] Ibid., vol. i, p. 105.
[21] Ibid., p. 136.

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chants, and especially to the Royal African Company of England. This company was encouraged by the British government to furnish regularly a supply of "merchantable negroes" to Virginia, at "moderate rates." The king's dividend in this company was £322. 10s. a year.[22] The governor was ordered to prevent any trading between Virginia and the part of Africa under the jurisdiction of that company, and to report annually the number of negroes brought in.

The British government further endeavored to protect this and other companies by a special clause in the instructions to the governor (Earl of Albemarle) in 1738, regarding the courts of the colony. It stated that owing to the frequent adjournment of the courts, the Royal African Company and others were prevented from recovering debts due them. The governor was to see that this irregularity was not repeated, and also to refuse to give his assent to any act of the Assembly imposing a duty on negroes imported into the colony, to the "great discouragement of merchants trading to Africa." Notwithstanding the unquestionable support of the Royal African Company by the British government, this instruction was not strictly executed, for the British government approved certain acts for this purpose. The preamble of these acts, however, specified that the duty was for "lessening the levy by poll," for "building the capitol," for paying the debt incurred by the French and Indian War, and for "other public charges." The revenue from this duty was thus appropriated to the support of the government, which fact no doubt accounted for the approval of the British authorities. The real motive of the colonists in laying a duty on slaves was to prevent the increasing importation of them. In addition, as late as 1772 the burgesses requested the king that for the good of the colony the slave trade, long considered a "trade of great inhumanity," might be abolished. They referred to the merchants as

[22] British Museum, Add. MSS. no. 10119, f. 216. This was for the period 1685–1689. The dividend was no doubt continued.

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follows: "We are sensible that some of your majesty's subjects in Great Britain may reap emoluments from this sort of traffic, but when we consider that it greatly retards the settlement of the colonies with more useful inhabitants, and may in time have the most destructive influence, we presume to hope that the interest of the few will be disregarded when placed in competition with the security and happiness of such numbers."[23]

In the seventeenth century very few ships were owned by the colonists. By the middle of the eighteenth century the number had gradually increased, but even then the British-owned vessels far exceeded those owned by the colonists. Robert Dinwiddie, then surveyor-general of the customs for the southern district of America, in his report on Virginia to the Duke of Newcastle, one of the principal secretaries of state, said that in 1743 there were fifty ships owned by Virginians, and one hundred and fifty British ships trading in the colony. To encourage the colonists in owning ships, the Assembly exempted them from castle duties—later known as port duties—the two shillings a hogshead on tobacco exported, the duty on liquors for a brief period, and half of the naval officers' and collectors' fees.[24] The British merchants maintained that this was an unjust discrimination, as they were required to pay duties and fees from which the colonists were relieved. The exemptions from the port duty and the duty of two shillings a hogshead are not mentioned in the acts of Assembly after 1710, and that from half the naval officers' and collectors' fees, after 1748. The British authorities, yielding to the desire of the traders, disallowed certain acts which contained these exemptions.[25]

It is quite evident that the interests of the merchants were conserved at the expense of the colonists, who from time to time endeavored to develop the resources of the colony. The

[23] Journal of the House of Burgesses, 1770–1772, p. 283.

[24] Hening, vol. i, pp. 402, 536; vol. ii, pp. 134, 272; vol. iii, pp. 23, 88, 347, 352, 494; vol. vi, p. 97.

[25] C. O. 5: 5, fs. 61–62, 200–203; Journal of the House of Burgesses, 1710–1712, p. 281.

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merchants opposed any plan of the colonists that would render them less dependent upon commercial intercourse with England. The Board of Trade, reporting to Parliament a letter from Governor Gooch of Virginia of February 1, 1732/3, said that "Major Gooch in his letter of Oct. 5th last, informed us that there is, now, no act subsisting in that province, which can, in any sense, be said to affect the British trade. That since the last returns to us upon this subject, there hath been one potters' work set up in Virginia, for coarse earthenware, but that this is of so little consequence, that he believes it has occasioned little or no diminution of the earthenware that used to be imported. That they have now four iron works in that colony, employed in running pig iron only, which is afterwards sent to Great Britain to be forged and manufactured."[26]

That the merchants occupied a position of much influence is quite apparent, and that they often used this influence in their own interest to so marked a degree as to provoke the colonists is clearly shown by the remonstrances against them. There was more or less complaint during the period from 1700 to 1775; in fact, the dissatisfaction dated back to 1660. The protest against the oppressive demands of the merchants in 1732 resulted in the petition known as "The Case of the Planters of Tobacco in Virginia," which was sent to the British government by a special agent. This was a memorial of the Assembly, and was approved by Governor Gooch;[27] it complained of the British merchants, who had added to the already heavy transportation and customs duties other demands which made it impossible for the planters to make a profit. This petition was not answered favorably.

The action of the merchants somewhat later in regard to the paper money of the colony served to antagonize the colonists still further. On May 19, 1763, Governor Fauquier in a speech to the Assembly referred to a special instruction recently received and communicated to that body, regarding

[26] C. O. 5: 5, f. 2.

[27] Gooch in a letter to the Duke of Newcastle, July 20, 1732, commended Sir John Randolph, the special agent of the Assembly.

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the payment in sterling coin of debts owed to British merchants. This instruction had not been obeyed, and upon a renewal of the complaint of the merchants to the Board of Trade, the governor had been again informed of the endorsement of the claim of the merchants, and copies of the resolutions of the Board regarding this matter had been sent to him.

In laying these resolutions before the Assembly, the governor said: "I have never yet deceived you, and I will not now attempt it; but in plain language inform you that all endeavors to evade their force will prove fruitless, and plunge you still deeper in his majesty's displeasure. It is absolutely necessary that something should be done to give the merchants that satisfaction for which they call upon you, and for which in case of failure of success here, they will call upon a higher power."[28] A full explanation was given in an address of the burgesses to the governor, May 28, 1763, and a declaration of the loyalty of the colony was set forth as follows: "Our dependence upon Great Britain we acknowledge and glory in, as our greatest happiness and only security, but this is not the dependence of a people subjugated by the arms of a conqueror, but of sons sent out to explore and settle a new world for the mutual benefit of themselves and their common parent."[29] Regarding the debt incurred by the French and Indian War, the burgesses stated in this address that they would "cheerfully sustain" it "if the merchants had not raised a most unreasonable clamor against our paper bills of credit." Explaining the issue of paper money, they said: "All our neighboring colonies had long before adopted, and most of them repeated, the expedient of paper to supply the want of specie, in time of peace, but that we did not follow their example, before the last war, after all our treasure was anticipated, and that even then we chose at first to borrow £10,000, granted for his majesty's service, at the high interest of six per cent., and

[28] Journal of the House of Burgesses, 1761–1765, p. 171.
[29] Ibid., pp. 188–192.

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never until after that resource failed, went into a measure so little relished, and always, except in one instance of trifling consequence, confined the amount of the notes to the money granted."

The merchants claimed that they were being unjustly dealt with because the instructions to the governor of January 3, 1759, were not being followed. To avoid any contention which might be later raised by the merchants, the burgesses sent at that time an address to the king in regard to the proposed issue of paper money. It was not until 1763 that the merchants again complained. In answer, the burgesses said: "We concluded that as they raised no objection, they were satisfied of our intention to do them justice. And we can venture to say that had we known our reasons were not satisfactory, it would have prevented several subsequent emissions, and particularly the last which gave rise to the present complaint." After declaring their purpose to pay in sterling money as far as possible, any debts owed to the merchants, and stating that the notes complained of were issued for a limited time and were secured by taxes, the burgesses said: "But, at the same time, we considered how the interest of the British merchants might be affected by this money, and at least as far as was in our power, if not effectually, secured that from injury." Commenting on the action of the merchants some years before in regard to the rate of exchange in the payment of sterling debts, the burgesses showed that the law of 1748 providing that sterling debts should be discharged by allowing twenty-five per cent addition—the difference at that time between current money and sterling coin—was objected to by the merchants. The complaint of these traders that they would be the losers when the exchange should be over that amount was considered by the burgesses, and the courts were empowered to settle at what rate of exchange sterling debts should be discharged. The merchants did not, however, consider this sufficient security.

The decision of the burgesses in the case, as stated in the above address, was as follows: "As the present possessors

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of the treasury notes have received them under the faith of a law, making them a legal tender in all payments, except for his majesty's quit rents, to alter that essential quality of them, now, would be an act of great injustice to such possessors, and that as the British merchants have constantly received, and under the present regulations of our laws, will continue to receive, such notes for their sterling debts, according to the real difference of exchange between this colony and Great Britain, at the time of payment, their property is so secured as to make such alteration unnecessary with respect to them."

The merchants renewed their complaint to the Board of Trade in 1764, hoping to obtain their demands through that body and the governor without laying them before Parliament.[80] Governor Fauquier, in presenting again the claim of the merchants, maintained that it was "reasonable on the face of it." The reply of the burgesses of November 9, 1764, stated quite clearly their position. "As we have not sterling specie to pay here, which the merchants well know, we could secure the sterling creditors from injury, in the receipt of the paper, by no other means that we can suggest, except by directing that they should be paid so much paper as would place their money in Britain without loss."[81] The position of the merchants, supported by the Board of Trade and the governor, was considered all the more unreasonable in view of the fact that the issue of paper money was made necessary by the expenses incurred by the colony in supporting the French and Indian War.

That the merchants were influential in having passed the acts of Parliament laying duties on certain articles imported into the colony may be readily inferred. A letter of June 22, 1770, from Governor Botetourt to the secretary of state regarding the association formed in the colony for a systematic boycotting of British goods stated that the British merchants were largely responsible for it.[82]

[80] Journal of the House of Burgesses, 1761–1765, p. 227.
[81] Ibid., p. 249.
[82] Ibid., 1770–1772, introduction, p. 27.

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Governmental Expenses.—The colonies were considered of importance only so far as they served the interests of the British government, and especially the interests of the English merchants, as was demonstrated by the frequent regulations regarding trade. That the colonies gave Great Britain material assistance seems amply demonstrated upon the authority of one whose position afforded him an opportunity to ascertain the actual returns from the colonies. A statement in 1707 to the lords of the treasury from William Blathwayt, the auditor-general of the colonies, asserted that the American colonies were the chief support of Great Britain.[1] The colony of Virginia was but one in the British colonial system, and from the British point of view was estimated very largely by the value of its exports to England. The opinion of the British authorities of the relative wealth and importance of Virginia is shown in the apportionment of the assistance to be given by the colonies to New York. The royal instructions of May 19, 1732, to the governor of that colony stated that the assemblies of certain colonies had been directed to appropriate specified amounts toward the erection of forts on the New York frontier.[2] Virginia was assessed far more than any other colony. It was stated that the contributions should be "in proportion to the respective abilities of each plantation." It was also provided that in case of invasion of New York, the other colonies were to furnish troops.[3] Virginia was called on to furnish forty more men for the defense of New York than that colony itself was expected to supply.

When Virginia became a royal colony in 1624, the British government proposed to assume the expense of the local governmental charges, including the governor's salary and the cost of defense against the Indians, which were to be met

[1] Cal. St. P. Treas. Papers, 1702–1707, p. 532.

[2] Rhode Island and Providence, £150; Connecticut, £450; Pennsylvania, £350; Maryland, £650; Virginia, £900 (C. O. 5: 195, 42).

[3] Massachusetts Bay, 350; New Hampshire, 40; Rhode Island, 48; Connecticut, 120; New York, 200; East New Jersey, 60; West New Jersey, 60; Pennsylvania, 80; Maryland, 160; Virginia, 240 (C. O. 5: 195, 42).

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with part of the revenue on tobacco.[4] Shortly after his accession, Charles I also stated that the maintenance of all public officials in Virginia should be borne by the crown.[5] Until 1643 a part of the governor's salary was paid either directly or indirectly out of the royal exchequer, but from that date until about 1660 the whole salary was paid by the colonists directly by public tax. After that it was paid indirectly out of the duty on exported tobacco. Thus the assumption by the British government of the salary of the governor was invalid, except during the brief period indicated. As each of the officials of the colony is studied, it is observed that not only the provincial appointees, but also those holding royal commissions were either directly or indirectly paid by the colonists.

The British authorities, notwithstanding the declaration of their intention to bear the cost of defense against the Indians, left this matter very largely to the colonies, for it was in fact the established policy of the British government that in times of peace in Europe the defense of a colony against a local enemy should devolve primarily on the colony itself. This policy was departed from with reluctance.[6]

In 1695 the British government, deciding to leave the defense of the New York frontier to the colonies, directed that an appropriation of £500 be made by Virginia for this purpose. In an address to the governor the burgesses insisted that in view of the taxes and other expenses then borne in order to protect the frontier of Virginia, the colony should not be expected to aid New York. They maintained that Virginia had never received assistance, and added: "to which opinion they are the more induced, by this further consideration, that as this country always has in its greatest necessities, borne its own charge, without any assistance from other places, and by means thereof, is reduced to a lower ebb and degree of want, so now it must by the forces and assistance lodged within itself, be its own defense and

[4] T. Rymer, Foedera, vol. xvii, p. 669; Beer, Origins, p. 318.
[5] Cal. St. P. Col. 1574–1660, pp. 73–74.
[6] Beer, Origins, p. 319.

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guard." When the importance of the matter was strongly urged, the Assembly appropriated £500, to be raised by a special duty on imported liquors, but requested that the king would not again make such an assessment. Notwithstanding this request the colony was called on in 1701 for an additional appropriation of £900 for the same purpose. When the Assembly refused to grant it, the governor (Nicholson) offered to advance the money, with the understanding that he would be refunded out of the quit-rents, but it seems that the money was not needed.[7]

In 1698 the lords of the treasury directed the governors of Virginia, New England, New York, Jamaica, Barbadoes, and the Leeward Islands to give credit to Admiral Bembo and his squadron in the West Indies, and to furnish him with money to the amount of £3000 for provisions and other expenses. Virginia was to furnish £500 of this amount.[8]

When military supplies, amounting in value to £3388, were sent to Virginia in 1702, the governor was instructed to "forthwith cause the said sum" to be paid out of the quit-rents and to be transmitted by bills of exchange to the treasurer of the ordnance office. In addition to thus refunding the cost of these supplies, the members of the militia to whom any of these supplies were issued were required to pay for them, and the money arising from such sales, in accordance with the directions of the British government, was kept by the receiver-general as a royal reserve fund to be used for the service of the colony.[9]

The colony not only paid for its own defense, but volunteered to make an appropriation for an adjacent colony which was being disturbed by Indians, although the financial condition of Virginia would hardly justify it. In an address to the governor of December 21, 1711, the House of Bur-

[7] Cal. St. P. Col. 1701, no. 1040; Journal of the House of Burgesses, 1695–1696, pp. 16, 35, 37; 1702–1705, pp. 16, 20.
[8] Plantations General, vol. iv (2), 146.
[9] Blathwayt's Journal, vol. ii, p. 116; Journal of the Council of Virginia, MS., 1689–1703, p. 157.

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gesses, commenting on the appropriation for the assistance of North Carolina, said: "Nothing less than the deplorable state of our distressed fellow subjects of North Carolina, joined with the just apprehensions we have of the dangers hanging over our heads from the common enemy, could ever have prevailed with this house to have made a resolve to raise £20,000, at a time when our staple commodity will hardly afford necessaries for the support of the people, and our present funds have proved in great measure deficient."[10] In 1715, also, men were sent from Virginia to aid South Carolina during an Indian war in that colony.[11]

In 1732 the British government again called upon the colonies to help New York, and assessed Virginia £900 for the erection of forts on the New York frontier, and requested her, in case of invasion, to furnish two hundred and forty men.[12] Virginia had supported New York on a previous occasion, but did not at this time comply with the royal instructions.

In 1740 the colonies were called upon to furnish soldiers to cooperate with the regular British troops in an offensive war against the Spaniards in the West Indies. Governor Gooch and four hundred men went from Virginia to join the regulars at Jamaica, and proceeded thence to attack Carthagena, on the northern coast of South America. The Assembly, "desirous to give the utmost testimony of their loyalty and affection to his majesty's person and government," appropriated £5000 for the expedition, and as this amount exceeded the funds in the treasury, a large part of it was loaned by individuals. In addition to this appropriation, the Assembly provided for £500 to be raised by a special duty on imported slaves, which was to be used for the support of the soldiers while waiting to embark, for those who might be wounded in the campaign, and for the families of those who might be killed. In the act providing for this appropriation it was stated that the colony was thus "to

[10] Journal of the House of Burgesses, 1710–1712, p. 344.
[11] Journal of the Council of Virginia, MS., 1705–1721, p. 241.
[12] C. O. 5: 195, 42.

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provide for and defray the expense of victualling and transporting the said soldiers, and all other incident charges attending the enlisting of them, (except their pay, clothes, arms and ammunition), till their arrival at the general rendezvous in the West Indies." The British government could not, of course, expect Virginia to do more than furnish these soldiers and pay the expense of transporting them to Jamaica. As the results of the expedition, even though successful, could have only an indirect effect on Virginia, it would have been unjust to require the colony to bear the expense after the soldiers reached Jamaica. This was an unusual campaign in that the provincial troops were not only to leave their own colony, but were also to leave the mainland of America in the interest of Great Britain. It was therefore to be expected that the British government would depart from its policy in regard to leaving the matter of local defense to the colonies themselves, and assume the expense of the campaign after the troops reached Jamaica.

Though the pay of the colonial troops and their clothes, arms, and ammunition were to be furnished by the British government, it was fully two months after the arrival at Jamaica before any effort was made to provide for them. While waiting for Lord Cathcart, who was expected to bring funds from England, a loan of £2000 was negotiated with merchants in Jamaica, which, however, was only sufficient for the officers.[13] Immediately after this expedition, upon request from Georgia for assistance against the Spaniards, who were threatening that colony, Virginia sent troops there, in spite of the fact that there were apprehensions of a Spanish invasion of Virginia, of an Indian attack, and also of slave insurrections within the colony.[14]

In 1745 Virginia cooperated with England in her preparation for the invasion of Canada by rèsponding to the request of Governor Shirley, and by sending £1273. 11s. 2d. to

[13] Cal. St. P. Treas. Books and Papers, 1742–1745, pp. 19, 321; C. O. 5: 41, 25, 106–108, 110–112; Hening, vol. v, pp. 92, 121.
[14] Virginia Magazine of History and Biography, vol. xvii, p. 43.

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Cape Breton for provisions for the garrison.[15] When the invasion was begun the next year, the British government requested the American colonies to furnish five thousand men.[16] Virginia appropriated £4000 toward raising her quota of troops, and £600 for provisions and quarters for British soldiers bound for Canada, but compelled to stop in Virginia on account of storms. This was a war begun by the British government and not by the colonists, and was a war of conquest and not one primarily of self-defense. It was a struggle between England and France, therefore the British authorities did not expect the colonists to bear all of the expense. The provincial troops were to be paid from the British treasury and their arms and clothes furnished to them. It was necessary, however, for the treasurer of Virginia to borrow a sum not exceeding £4000 in order to put the troops raised by the colony in readiness, and the arms kept in the public magazine were used in order to hasten the mobilization of troops at Albany.[17] Governor Gooch of Virginia was appointed brigadier-general in command of the troops to be raised by Virginia, Maryland, Pennsylvania, New Jersey, and New York, but he declined to serve.[18]

In 1757 South Carolina was again at war with the Indians, and four companies were sent from Virginia in response to her call for help.[19] In these several instances Virginia rendered assistance to the adjacent colonies with no expectation of reimbursement by the home government.

At the beginning of the French and Indian War the British government evidently intended to continue the policy of leaving the colonies to defend themselves. The Albany Congress (1754) was in full accord with that policy, as it was an effort to form a union of the colonies in order to provide a more adequate system of defense at the expense of the colonies and not of the British exchequer. When the Brit-

[15] Journal of the Board of Trade, vol. liv, p. 25.
[16] C. O. 5: 45, 215, 242.
[17] C. O. 5: 45, 2; Hening, vol. v, p. 401; Journal of the House of Burgesses, 1742–1747, pp. 221, 231; 1748–1749, pp. 265, 268.
[18] C. O. 5: 45, 239–242.
[19] Journal of the House of Burgesses, 1756–1758, p. 427.

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ish government sent £20,000 to Governor Dinwiddie for the defense of Virginia in 1754, it was not to be considered as an indication of a decided change in that policy. The colony did not depend solely upon this royal appropriation, for the Assembly provided by special taxation for the war.[20] This sum was in fact a loan, and was to be refunded, as is shown by a letter of July 3, 1754, from the secretary of state to

[20] The appropriations made by the Assembly from 1754 to 1759 and the methods of taxation were as follows:—

February,	1754.	£10,000	appropriated. This amount was to be borrowed by the treasurer at 6 per cent, and the following taxes were imposed for six years: an additional duty of 5 per cent on slaves imported, 20s. on every carriage, 20s. on every license for an ordinary, from 1s. 3d. to 2s. 6d. on processes at law.
October,	1754.	£20,000	appropriated. A tax of 5s. was imposed for one year (October, 1754–October, 1755) on every tithable. Under the same appropriation there was also imposed (May, 1755) an additional duty of 10 per cent on slaves imported, over and above the usual duty and the special duty imposed in 1754, a tax of 2s. on every slave already in the colony, and a tax of 1s. 3d. on every one hundred acres of land, for one year.
May,	1755.	£ 6,000	appropriated. To be raised by a lottery.
August,	1755.	£40,000	appropriated. A tax of 1s. on every tithable and 1s. 3d. on every one hundred acres of land, for three years (1757–1760).
March,	1756.	£25,000	appropriated. A tax of 1s. on every tithable, and 1s. on every one hundred acres of land, for three years (1758–1760).
March,	1758.		Amount not specified, for increasing military force of 2000 men. A tax of 1s. on every tithable, and 1s. on every one hundred acres of land, for four years (1761–1764).
November,	1759.	£10,000	appropriated. A tax of 2s. per hogshead on tobacco, to be paid by the owner to the inspector at the warehouse. This was in addition to the 2s. per hogshead duty paid to the royal collector when tobacco was exported. This additional tax was to be paid for two years (October, 1767–October, 1769).

While waiting for the collection of these special war taxes, the treasurer borrowed money, usually at six per cent, or issued "treasury notes," which were legal tender (Hening, vol. vi, pp. 417, 435, 453, 461, 521; vol. vii, pp. 9, 163, 331).

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Dinwiddie: "Whereas the duty of two shillings per hogshead upon tobacco, is applicable to the contingent expenses of our government there, our will and pleasure is, and we do hereby direct, authorize, and command you, to issue your warrant, from time to time, for paying over the balance of the money in the receiver's hands of the said duty, and such other sums, as shall hereafter appear to be the balance in his hands thereof, as far as the sum will go, unto our right trusty and well beloved William Pitt, paymaster general of our forces, to re-imburse and make good the said sums of £10,000 so sent over in specie, and £10,000, so to be advanced on the credit of your bills."[21] Thus the colony, although in debt, was required to reimburse the British exchequer. In the address of the Council of Virginia to the king on November 16, 1754, which thanked him for the above appropriation, it was stated that "the extraordinary supplies necessarily raised in the late war, and upon this occasion, have involved us in a debt, which all our funds, at present, are not able to satisfy."[22]

Dinwiddie complained to the secretary of state of the inadequacy of the revenue from the duty on tobacco of two shillings per hogshead, and begged that the royal order to reimburse the British exchequer for the £20,000 loaned to the colony might be temporarily suspended, until the expedition against the French and Indians could be completed and the treasury replenished.[23] In a letter of June 6, 1755, from Dinwiddie to the Board of Trade it is shown, however, that some of this revenue was sent to England: "Agreeable and in obedience to his majesty's commands, I have transmitted my warrant to the paymaster general, for £2,000, payable by Mr. John Hanbury, from the revenue of two shillings per hogshead on tobacco in this colony, that is the only one, I have recourse to for payment of any emergencies of government. I, therefore, have left the small sum of £767, 15s., 6d. in the receiver general's hand."[24]

[21] C. O. 5: 211, 77, 91.
[22] C. O. 5: 15, 21.
[23] Dinwiddie Papers, vol. i, p. 353.
[24] C. O. 5: 15, 585.

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In 1755, in addition to Braddock's expedition, three other military enterprises were undertaken,—the campaign in Nova Scotia, the expedition against Niagara, and that against Crown Point, the last being purely a colonial undertaking. The Board of Trade estimated the expenses of the colonies in these expeditions at £170,100, and recommended that Parliament grant them £120,000 "as an encouragement to exert themselves for the future in their mutual and common defense."[25] Parliament, however, granted £115,000 to the northern colonies, which practically covered their expenses, but nothing to the southern colonies until Virginia and North Carolina protested against the discrimination. The next year (1757) Virginia, North Carolina, and South Carolina received £50,000, of which amount Virginia received £32,269.[26] James Abercromby, solicitor of Virginia affairs, stated that that colony alone between 1753 and 1756 spent £100,000 sterling, although the Board of Trade estimated that only £22,000 was appropriated by Virginia for the above expeditions.[27] After the appropriations made in the colonies in 1758, Parliament voted the next year £200,000 to reimburse them, of which amount Virginia received £20,546.[28] Similar appropriations were made in subsequent years throughout the entire war.[29] By these appropriations the British government was partially reimbursing the colonies for their help in meeting an emergency which, without the assistance of provincial troops, could not have been so successfully met. The British authorities were anxious to encourage the raising of colonial troops, as this plan rendered it less necessary to raise troops in England, and also saved

[25] New York, £18,900; New Jersey, £6900; New Hampshire, £9000; Massachusetts, £60,000; Connecticut, £29,000; Rhode Island, £8000; Maryland, £4500; Pennsylvania, £3800; North Carolina, £8000; Virginia, £22,000 (Beer, British Colonial Policy, p. 53).

[26] 29 George II, c. 29; 30 George II, c. 26; Hening, vol. vii, p. 372; Journal of the House of Burgesses, 1758–1761, p. 184.

[27] Beer, British Colonial Policy, p. 53.

[28] Hening, vol. vii, p. 372; Journal of the House of Burgesses, 1758–1761, pp. 172, 184.

[29] 1759, £200,000; 1760, £200,000; 1761, £200,000; 1762, £133,333; 1763, £133,333 (32 George II, c. 36; 33 George II, c. 18; 1 George III, c. 19; 2 George III, c. 34; 3 George III, c. 17).

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the heavy cost of transporting them, as well as the regulars, from England.

Before the plan to reimburse the colonies was adopted, it was difficult to secure sufficient cooperation from all of them. It was thought by some that the colonies should be forced to cooperate with each other and to assume a proportionate share of the expense of the necessary military establishment. Dinwiddie wrote to the secretary of state on February 12, 1755, and suggested that if they would not cooperate, Parliament might lay a special tax on them for this purpose.[80] As soon, however, as they were assured of reimbursement, they were generally more favorable to the war. Massachusetts, Connecticut, and New York, according to Beer, showed throughout the war more public spirit than any other colonies.[81] The share of the expense of the war borne by Virginia was £385,319, which was the next largest debt to that of Massachusetts,—£818,000.[82] It would seem, therefore, that Virginia, while not appropriating as much as Massachusetts, showed more public spirit in this respect than Connecticut or New York. Virginia should not be included with the other southern colonies in the rebuke by Pitt for their "want of zeal." Sir Jeffrey Amherst, commander-in-chief of the army, in a letter to Governor Fauquier of Virginia, sent from New York under date of September 24, 1762, commended the colony for promptness in raising the troops requested, and said that it deserved special thanks from the king. He stated that "the colony of Virginia should be the first that claims that high honor. The ready compliance of your Assembly in making the necessary provision for both the requisitions of his majesty and the zeal and spirit particularly exerted in completing the quotas of men demanded for the regular corps, are strong proofs of the loyalty of the colony in general, and of the great regard they pay to his majesty's commands."[83]

[80] Dinwiddie Papers, vol. i, pp. 493, 496.
[81] British Colonial Policy, p. 58.
[82] Plantations General, vol. xxii, 18.
[83] C. O. 5: 62, 575.

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Although Parliament made the appropriations mentioned, they were inadequate to reimburse the colonies fully. The total expense of Massachusetts and Virginia was £1,203,-319, and the total amount appropriated by Parliament was £1,036,666 for all the colonies. The colonies were refunded about forty per cent, or two fifths, of their expenditures for this war.[84]

In this connection it may be well to mention briefly the ordinary expenses of the colony. While the policy of Great Britain was to throw upon the colonies the responsibility of meeting their own expenses, in the case of Virginia it became necessary, on a few occasions, to request an appropriation from the quit-rents for the usual governmental charges. In 1699, for example, Virginia was not self-supporting without the use of the royal quit-rents, as the other revenues were not sufficient to meet the ordinary expenses.[85] A royal order was issued to the governor (Nicholson) authorizing him to appropriate £2955. 9s. 8½d. of the quit-rents for this purpose.[86] By 1700, however, Nicholson had succeeded in bringing the colony out of debt, and was praised by the Board of Trade for this service.[87] By the end of the year 1702 he reported £10,000 to the credit of the colony, and in 1705 the deposits amounted to £7698. But by 1715 the colony was not self-supporting without using the quit-rents, permission for which was granted by the king upon a petition of the Assembly as well as a request from the governor.[88] As the usual revenue of about £4000 was thus again insufficient for the salaries of the officers of the colony, which aggregated at that time £3377 a year, besides the other ordinary and special expenses, £300 was appropriated out of the quit-rents.[89]

In 1717 Governor Spotswood informed the Board of

[84] Beer, British Colonial Policy, p. 57.
[85] Cal. St. P. Col. 1696–1697, p. 465, no. 967.
[86] Cal. St. P. Col. 1699, p. 309; Executive Papers, MS., 1693–1699.
[87] Journal of the Council of Virginia, MS., 1698–1703, p. 113.
[88] Cal. St. P. Treas. Papers, 1708–1714, p. 573; 1714–1719, p. 159.
[89] Virginia Magazine of History and Biography, vol. iii, p. 121; Sainsbury, vol. iii, p. 461.

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Trade that the revenue from the duty on tobacco of two shillings per hogshead lacked £1973. 10s. 4d. of being enough to finish paying the salaries and the usual expenses for the preceding year, which amounted to £3500, and he requested that the necessary warrant be issued authorizing him to make up the deficit out of the quit-rents. These were held by the receiver-general, and amounted to £3766. 1s. 4d.[40] According to a statement in the Calendar of Treasury Books and Papers,[41] Virginia and New York were the "only colonies in which the quit rents are accounted for to the crown." Since this was the case, and also since the quit-rents were paid by the colonists, it was very reasonable that they should expect the British authorities to consent to the use of this revenue for the regular expenses of the government of the colony. By about 1760 the annual expenses of the colony were estimated by the British government at £8000. The two shillings per hogshead revenue amounted at this time to £7000.[42]

In 1756 Governor Dinwiddie stated in regard to the resources of Virginia and the revenues actually collected that "this Dominion pays more to the crown than all the others."[43] The surveyor-general of the customs for the southern district of America in his report in 1743 to the Duke of Newcastle, one of the principal secretaries of state, said that the value of goods shipped annually from Great Britain and Ireland to Virginia was £180,000, and that the value of the exports from Virginia (including wheat, Indian corn, pork, skins, furs, lumber, iron, and thirty-five thousand hogsheads of tobacco) was £380,000 a year,—a total import and export trade of £560,000.[44] The trade of the colony, which was largely with Great Britain, was estimated about 1740 by Governor Gooch at £434,000 annually, £300,000 of which was in tobacco.[45] Governor Howard stated to the lords of

[40] Spotswood Letters, vol. ii, p. 247.
[41] 1731–1734, no. 201.
[42] C. O. 5: 216, 8, 121.
[43] Dinwiddie Papers, vol. ii, p. 437.
[44] C. O. 5: 5, f. 200–203.
[45] Virginia Magazine of History and Biography, vol. iii, p. 123.

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trade in 1683 that the revenues from Virginia exceeded those of all the other colonies combined.[46] This prosperous condition of the colony existed earlier also, for Giles Bland, collector of the royal revenues in Virginia, writing in 1676 to Sir Joseph Williamson, referred to the "yearly revenue of more than £100,000, which Virginia affords to his majesty."[47] Sir John Knight, writing to the Earl of Shaftsbury in October, 1673, stated that the British customs duties paid by Virginia on tobacco alone amounted to £150,000 a year.[48] Sir Henry Chicheley, in presenting in 1673 a petition from the governor and the Assembly of Virginia to the king for military supplies, stated that the claim of the colony was based on the fact that Virginia furnished a larger annual revenue to the crown by customs than any other plantation in the British dominions.[49]

Although the colony did not always administer its government without incurring expenses which could be met only by the use of the quit-rents, yet the prosperity of the colony and its importance to Great Britain were unquestioned, and the royal customs were collected fairly regularly, and the quit-rents sent to the royal exchequer. When the British government made an appropriation to relieve the embarrassment of the colony, it was usually out of the quit-rents, which had been collected but not forwarded to England. These revenues, and also the revenue from the duty of two shillings per hogshead on exported tobacco, which was used for paying the salaries of the officials, were of course raised by the colonists. Although these were considered to belong to the king, the colonists themselves were, after all, maintaining the government of the colony. Regarding the adequacy of these revenues, the Board of Trade stated in its report on Virginia in 1767 that the two shillings per hogshead and the quit-rents "form an ample and sufficient fund for the payment of the civil establishments of this colony."[50]

[46] Cal. St. P. Col. 1681–1685, no. 1273.
[47] Cal. St. P. Col. 1675–1676, no. 906; 1677–1680, no. 304.
[48] Cal. St. P. Col. 1669–1674, no. 1159.
[49] Ibid., no. 1118.
[50] C. O. 5: 67, 585.

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Efficiency of the Financial System.—Notwithstanding the frequent evasion of the revenue duties, there was, as has been shown, a large sum paid during the whole colonial period on imports and exports and in quit-rents. Much of this was sent to the British exchequer, and, therefore, was not used either directly or indirectly in the interest of the colony. The quit-rents were usually sent to England, regardless of the financial condition of the colony. In some cases, however, as has been pointed out, a portion of this royal revenue was permitted to be retained for the expenses of the colony. Had the British government paid the governor's salary, maintained the military system, and allowed all of the revenues raised in the colony to be kept for the use of the colony, there would have been, of course, no occasion for assistance. The colony was more than self-supporting, for with the few exceptions noted, the expenses were met, the quit-rents were forwarded to England, and when aid was necessary funds were appropriated by royal permission from the quit-rents, which were raised by the colonists themselves. The colonists not only maintained the royal government in Virginia, but also furnished troops and money to conserve British interests in the other colonies. These appropriations were, moreover, not confined to the colonies along the Atlantic Coast, but were made for expeditions against Canada and the northern coast of South America.

There was, in addition to the revenues which were used for the maintenance of the royal government, a system of provincial revenues raised for local purposes, such, for example, as the public, county, and parish levies, and the duties on liquors, slaves, skins, and furs. These provincial revenues seem usually to have been adequate to meet the ordinary expenses for which they were raised. In the case of so great an emergency as the French and Indian War, the public levy was much increased by the extraordinary demands of the situation. It was not only self-protection, but also the conservation of British interests that influenced

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the Assembly to increase the appropriations from these revenues during that war.

In the study of the actual administration much attention has been devoted to the officials concerned with collecting and expending the revenues. There were in the eighteenth century, when the revenue system was well established, about twenty royal officials concerned with the royal revenues, which were either used in the colony or sent to England, and, including the inspectors of tobacco and the sheriffs, about one hundred and fifty provincial officials, who were concerned with the revenues used for the support of the government and for purely local purposes. The classification of the revenue officials into royal and provincial cannot be strictly followed, as there was some duplication of office which makes such a classification unsatisfactory without detailed explanation. In the case of the sheriffs, for example, both royal and provincial functions were performed. The sheriffs were appointed and commissioned by the governor largely for the performance of duties related to the judiciary; at the same time, they were, to some extent, royal revenue officers, for they collected the quit-rents, which were the one source of revenue above all others that was regarded as royal. Generally speaking, however, the total number of royal, as compared with provincial, officials as given above may be accepted as approximately correct for the eighteenth century. The royal officials were appointees of the British government, and held commissions from the commissioners of the customs or some other British official, while the provincial appointees were commissioned by the governor or, as in the case of the treasurer, elected by the House of Burgesses. The appointees of the governor were, strictly speaking, semi-royal officials, since the governor himself held a royal commission, but they were usually considered provincial.

It is difficult to ascertain which officials were more faithful in the discharge of their duties, but the evidence seems to be in favor of the provincial officers. There were frauds in

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the revenues throughout the colonial period, and, no doubt, there were evasions of the provincial revenues, but the irregularities in the quit-rents and the royal customs, both as to payment and to collection, were often complained of, not only in the colony, but also by the British government. In certain cases the officials were wholly responsible, and were themselves guilty of fraudulent practices, while in others the system of exchange and credit in trade made it possible for the planters to evade the most vigilant revenue officer.

Notwithstanding the heavy demands made upon the revenues and the frequent frauds and evasions connected therewith, the financial system was, as has been shown, adequate for meeting the expenses of the administration of the colony, and also for conserving, to some extent, the interests of Great Britain beyond the limits of the colony. The controversy between the colonists and the British government which culminated in revolution was the result of a persistent interference with the financial and economic affairs of the colony which was considered oppressive and unjust.

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[1] The commission granted to the governor on his appointment and the instructions concerning revenue and finance are here mentioned. The complete lists of commissions and of formal, additional, and circular instructions will be given in a monograph on the Royal Government in Virginia, which it is my purpose to publish later.

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SERIES XXXIII NO. 3

JOHNS HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE
Under the Direction of the
Departments of History, Political Economy, and
Political Science

THE HELPER AND AMERICAN TRADE UNIONS

BY

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PREFACE

This monograph is the outgrowth of investigations carried on by the author while a member of the economic seminary of the Johns Hopkins University. The chief documentary sources of information have been the trade-union publications in the Johns Hopkins library. Documentary information, however, has been supplemented by personal observation and by interviews with leading trade unionists in Baltimore and with the secretaries of a number of national unions.

The author wishes to express appreciation for the invaluable assistance received from Professor Jacob H. Hollander and Professor George E. Barnett.

J. H. A.

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THE HELPER AND AMERICAN TRADE UNIONS

INTRODUCTION

A "helper," as the term is used in this study, is a person employed to help the skilled journeyman or journeymen under whose supervision he works. The essential marks of a helper as here defined are two: first, he is employed to promote the work of another; second, he is supervised in his work to some extent by the mechanic whom he assists. The kind of assistance rendered and the extent of the supervision exercised vary considerably in different classes of helpers. A helper's assistance to a journeyman may be as remote as that of supplying material to another, or as immediate as that of working hand to hand with another at all times. The supervision exercised by a journeyman over a helper may extend no farther than the giving of directions as to the placing of material, or it may be so close that the helper does no work for which he is not responsible to the mechanic who is directing him.

Distinguished with respect to the nature of the work done and the relation borne to journeymen in the performance of work, helpers may be roughly divided into three classes: (1) "remote helpers," (2) "helpers proper," and (3) "advanced helpers." All or none of these classes may be found in a single trade.

(1) By a remote helper is meant an assistant who does not come into intimate contact with journeymen in the performance of work. He is, as a rule, unskilled, and is ordinarily known as a laborer. He does preparatory and subordinate work which is necessary, but which is usually not claimed by journeymen as part of the trade. In other

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words, his work begins and ends with the lines marking the jurisdiction of a trade. Such a helper, on account of a close connection with journeymen while at work, must ordinarily come under the supervision of a journeyman. The hod-carrier, for example, is a helper of this class. He is a laborer who neither does nor helps to do any of the work claimed as bricklayers' work. However, the hod-carrier's work—the carrying of brick and mortar—is necessary in order that the bricklayers may proceed with their duties. As a rule, the hod-carrier is under the general supervision of a foreman, but he also receives orders from the journeymen whom he assists.

The characteristics of remote helpers differ greatly in the different trades and industries. In the building and the metal trades, where strength and endurance are required, this class of helpers is composed largely of mature men. In many industries—as the textile mills, garment factories, glass-bottle establishments, and printing offices—they are for the most part boys, often spoken of as "small help." Not infrequently it happens that these helpers are former journeymen who, on account of intemperance, an injury, or other causes, fail to secure positions requiring skill or carrying much responsibility.

(2) A helper proper is one whose work is so closely connected with that of a journeyman that it is necessary, or at least desirable, that he be under the direct supervision of a journeyman much or all of the time. This group of helpers may be subdivided into (a) helpers who assist mechanics at work some of which cannot be done by one man, and (b) helpers whose employment is wholly on account of the advantages of a division of labor and not on account of the absolute necessity of having two or more men cooperate in the performance of a single task.

(a) In many trades there is work which one man cannot do but which cannot be subdivided so that part can be done by one person and part by one or more other persons, each being independent in the performance of his particular

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duties. The process is a unit and must be executed as such. Each steam fitter, for instance, must have an assistant because he cannot by himself do the physical labor of lifting and adjusting the heavy fixtures used in steam fitting. The journeyman and his helper work hand to hand, the helper acting under the orders of the steam fitter at all times. In many cases there is no clear-cut assignment of work to the helper, what he does being left to the exigency of the case and to the discretion of the journeyman whom he assists.

In other cases there is a well-defined line between the work of the helper and that of the journeyman. For example, on a quadruple printing press it is necessary to have about six men; one of them has charge of the work, while all of the others are assistants, commonly known as press assistants. Each assistant has specific work to do, but the press must be in charge of one man. Another example of this type, which is different in some respects from that of the pressman's assistant, is the helper to the elevator constructor. This helper is a kind of specialist who knows a specific part of a complex trade. He may be able in some measure to do the work of a machinist, an electrical worker, or the operator of a hydraulic press. As in the case of the printing press, it is necessary that one person have general supervision of the entire work. This person is the journeyman elevator constructor, who is master of all parts of the trade.

(b) The second group of helpers proper has arisen as a result of the advantages of a division of labor. In tile setting, for instance, the ordinary duties of the helpers are to mix the cement mortar and carry it to the tile setter, to soak the tiles when such a process is necessary, to "grout"[1] the tile work after it is finished, to clean the work off, and sometimes to cut tile when pieces are required to fit a certain space. Obviously, all this work could be done by the tile setter himself, for there is no part of it which one man is

[1] That is, fill the joints.

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physically incapable of performing. In this case the helper assists a journeyman by relieving him of particular parts of a trade.

Helpers proper who are employed primarily to assist mechanics at heavy or complex work may do work which does not physically require the cooperation of two or more persons. When this occurs, the above classification to some extent breaks down. For instance, a boiler maker's helper was originally employed to assist a boiler maker in heavy lifting and in putting together the parts of a boiler. Gradually this helper has come to perform the simpler parts of boiler making. The extent to which this has taken place is indicated in an agreement between the Davenport Locomotive Company and the boiler makers of that shop. This agreement stipulates that "helpers' work shall be operating of shears, punches, drill presses, threading staybolts, attending tool room, heating on flange fires, tapping out holes for staybolts and running in staybolts, firing and testing boilers and all work helping boiler makers and boiler makers' apprentices in their various duties."[2]

(3) By advanced helper, as the term is used in this study, is meant one who does a journeyman's work but under the supervision of a journeyman. He is ordinarily a helper proper in transition to the status of a full mechanic. A helper proper assists a mechanic by relieving him of certain parts of the work of the trade or by helping him perform work which one man cannot do, while an advanced helper assists a journeyman on a particular job, often doing work exactly similar to that done by the journeyman himself. An "improver" in tile setting, for instance, is a helper proper who has been given an assistant of his own and is doing the work of a journeyman, but is usually under the supervision of a competent tile setter. In short, he is a journeyman on probation. The "junior" or improver in the plumbing and marble trades and the advanced or "helper-apprentice" in

[2] Journal of the Brotherhood of Boiler Makers and Iron Ship Builders, October, 1908, p. 726.

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the blacksmiths' trade are similar to the improver in tile setting.

Some advanced helpers are of a slightly different type from that described above. The improver in the carpenters' trade, the "handy laborer" in bricklaying, and the "handy-man" in machine and boiler shops, although doing journeyman's work and using journeyman's tools, are usually confined to certain kinds of work. The chief difference between an advanced helper of this type and a helper proper whose existence is due to the advantages of a division of labor is that the former works at a higher grade of work and less directly under the supervision of journeymen than does the latter. Improvers, handy-men, and handy-laborers do not always work under the supervision of mechanics, but since they more often do, it seems proper to include them within the scope of the term "helper."

The body of helpers as here defined obviously includes all auxiliary workmen or assistants connected with a trade or industry. Inasmuch as this use of the term is not in harmony with existing practice in many trades, it is necessary to indicate the terms employed in various industries.

In certain trades the auxiliary workmen are divided into two, sometimes three, classes. For example, in a machine-shop a "laborer" sweeps the floors, carts material about the shop, removes the finished product, and performs other general work of like character. Another group of workmen called helpers are men of some skill, or at least men of some experience in a machine shop. These helpers work in closer contact with the machinists than do the laborers. They get tools for the journeymen, oil and help to operate machines, and do other work which brings them under the direct supervision of the mechanic whom they assist. Still another group of auxiliary workmen known as "handy-men" or "specialists" are employed in machine shops. "Handy-man" originally meant, as the name signifies, one who could make himself useful about a shop. Sometimes he would directly assist a mechanic, at other times he would be en-

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gaged in work requiring a comparatively low degree of skill, in which case he frequently worked almost independently of any mechanic. As the work in a machine-shop became more and more diversified, the work of the handy-man became more and more specialized, until both with respect to the work which he does and the meaning attached to the term, the "handy-man" has changed to a "specialist." These three classes of auxiliary workmen—laborers, helpers, and handy-men—correspond respectively to remote helpers, helpers proper, and advanced helpers in our classification, but the first and the last of these are not included within the term helper as the machinists use it.

In boiler making, besides laborers, helpers, and handy-men, similar to workmen of the same names in the machine shops, there is another class of helpers known as "holders-on." A holder-on is a specialist who holds bolts while a boiler maker fastens them. In printing press-rooms there are three distinct classes of helpers proper, namely, "feeders," "feeders' helpers," and "press assistants." The feeder, as the name signifies, feeds the press; the feeder's helper assists the feeder in operating the automatic feeder; and the assistant pressman helps the pressman to care for and operate the press.

An illustration or two will serve to show that the term helper as the trade unions use it is vague, indefinite, and subject to frequent change in meaning. In 1910, when the United Brotherhood of Teamsters extended its jurisdiction and changed its name to the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, it was proposed that all garage laborers should be known as helpers, but after some discussion it was decided that they should be included in the term "stablemen."[8] In the convention of Boiler Makers in 1901 an effort was made to have the term "handy-man" substituted in the constitution for "helper." The only reason assigned for this proposed

[8] Proceedings, 1910, p. 9.

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change was that the term helper caused dissatisfaction among the journeymen.[4]

Unions as a rule do not consider any workman a helper unless the work of that person falls within the jurisdiction of the trade. From the union standpoint, trade lines separate the work of laborers from that of helpers, but as these lines are more or less arbitrarily drawn and are subject to frequent change, any attempt to follow out this distinction would prove unsatisfactory. The International Union of Bricklayers and Masons, for example, does not extend its jurisdiction to the carrying of brick and mortar, and consequently does not consider the hod-carriers as helpers. In Porto Rico, however, where the bricklayers are organized under the jurisdiction of the American Federation of Labor, the trade lines are extended and the hod-carrier is considered the bricklayers' helper.

A union often defines a helper on the basis of skill and the time of service in the trade rather than with regard to the nature of the work done. In an agreement between the Electrical Workers and their employers in New York, a helper is defined as "a man who has worked at the electrical construction business more than two years, and has passed the examination provided for herein and has been admitted to the union."[5]

In accordance with such definitions, helpers are often thought of less as assistants than as those who are organized by the union under the name helper; not so much as those who do a certain kind of work, but as those whom the union permits to perform it. In other words, a helper is one who is registered by a union as a helper, regardless of the work he may do. This was impressed upon the writer when he was shown through a large locomotive shop by a machinist who pointed out a number of persons as helpers, though apparently they were assisting no one. On asking for an explanation, it was learned that these men were doing the work of

[4] Proceedings, 1901, p. 241.
[5] Annual Report, New York Bureau of Labor Statistics, 1908, Part I, p. 250.

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machinists, but my guide considered them helpers because that was the grade under which the union classified them. In reading labor journals one is impressed with the frequency with which this signification is given to the term. The following from the report of Organizer Cummings of the Steam Fitters is typical: "I would have liked to tell him (Mr. Miller) just what kind of a shop he runs—one or two steam fitters and all the helpers he sees fit to put on his jobs."[6] The writer meant by this that Mr. Miller was having journeyman's work performed by men regarded by the union as helpers.

The helper must be differentiated from two other classes of workmen with whom he is frequently confused. These are (1) apprentices and (2) other subordinate workmen.

(1) With the decay of the apprentice system and the development of a helper system as a means of learning a trade, the lines of cleavage between a helper and an apprentice have become obscure in many trades.

To show the intricate relation between helpers and apprentices, let us first trace the development of the helper system of learning the plumbers' trade, which is typical of the development of the system in many other trades. In years past the greater part of a plumber's work was done in his shop, where the material was brought into shape. For the performance of the shop work, such as making lead traps, considerable skill was required, and instruction and practice in this work were necessary for one who aspired to be an efficient plumber. As the trade was remunerative, boys willingly apprenticed themselves to the master plumbers and worked for little pay apart from the instruction received. These boys were primarily learners and incidentally they assisted in the shops where they worked.

Gradually a change took place. As plumbers' work increased in volume, the amount of shop work to be done decreased relatively to the entire work. Large manufacturing establishments began to make, ready for use, every article

[6] The Steam Fitter, May, 1908, p. 5.

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needed in the plumbing trade. Since these articles were made in uniform sizes, plumbing became largely a matter of putting them together properly. Previous to the falling off of the shop work the boys and men hired to carry the tools and the material needed on a job and to render such assistance as the plumbers might require, had little opportunity to become practical plumbers and were clearly distinguished from the apprentices. When the shop work largely disappeared, it became the chief duty of the apprentice, as it was of the helper, to assist plumbers on construction work. Thus, the boy employed as a helper and the one under contract to be taught the trade were placed at identically the same kind of work and received about the same amount of instruction. Not only did the apprentice become a helper, but also the helper became a learner of the trade. This was due to the fact that a helper could not render the assistance required of him unless he received some instruction in his work. Besides, he had the same opportunities as the apprentice to observe the work of the skilled journeymen. On account of the change in the character of the work in the plumbing trade the helper and the apprentice came to have two qualities in common, namely, both were assistants and both were learners of the trade.

When it became possible for boys to learn the plumbing trade while serving as helpers, they naturally preferred not to enter into an apprentice contract. Since it was customary for each plumber to demand a helper,[1] the boys who wished to learn the trade felt fairly sure of an opportunity to do so without being subject to the restrictions and the low wages imposed by the customary apprentice contract. In the course of time a majority of those learning to be plumbers were in fact, if not in name, helpers and not apprentices.

As long as the helpers could not learn the trade the journeymen made no objections to their employment. In fact, journeymen often refused to work without helpers because

[1] Plumbers, Gas and Steam Fitters' Official Journal, December, 1908, p. 10.

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they wished to be relieved of rough, unskilled work. It was not long, however, before the plumbers became convinced that the helper system unless restricted would produce an excessive number of plumbers. The United Association of Plumbers became aroused, and undertook to check the use of helpers. At first it was their policy to distinguish clearly the apprentice from the helper, to limit the number and the promotion of the apprentices, and to do away with the helpers.[8] When this policy failed to accomplish the end desired, it was abandoned, and a plan was adopted which involved a complete reversal of former tactics. This new policy undertook to bring the helper within the scope of the apprentice regulations.[9] The helper was declared to be an apprentice, and if the number of apprentices and helpers employed by any firm exceeded the number of apprentices allowed the firm by the union, it was considered a violation of the apprentice regulations.

Sometimes the Plumbers, instead of using the terms helper and apprentice synonymously, include the helper within the term apprentice. John S. Kelly, president of the Plumbers, Gas, Steam and Hot Water Fitters, when asked for how long a term of service an apprentice must be taken, replied: "Four years as a helper and two years working under instructions."[10] One clause in an agreement between the master plumbers and the journeymen plumbers of Chicago in 1908 states that the term of apprenticeship shall be five years, three years as helper and two years with tools.

Confusion in the use of the terms helper and apprentice is characteristic of practically all the skilled trades in which helpers have opportunities to become craftsmen and in which the unions seek to maintain apprentice regulations. The results have, however, not been the same in all trades. With the Electrical Workers and the Elevator Constructors the attempt to distinguish between the two has resulted in a peculiar use of the terms. The constitution of the Electrical

[8] Constitution, 1897, p. 25.
[9] Proceedings, 1899, p. 26.
[10] Report of U. S. Industrial Commission, vol. vii, p. 966.

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Workers, Local Union Number 28 of Baltimore, provides that the period of apprenticeship shall be two years and that an apprentice shall become a helper at the end of the second year.[11] An agreement between the Electrical Workers, Local Union Number 3, and their employers describes a helper as a man who has passed an examination for work specified by the union and has worked at the trade two years, while an apprentice is defined as a boy registered by the union, who is employed to do errands, carry material to or on the job, attend lockers, or assist journeymen in testing. This agreement further states that apprentices must not encroach on the work of the helper or work with tools.[12]

In some localities the Blacksmiths and the Boiler Makers have sought to remedy the confusion growing out of the terms helper and apprentice by adopting a new term, "helper-apprentice." This term is applied to those helpers who are recognized as learners by being promoted to advanced work. This serves to distinguish them, on the one hand, from the helpers who have not been promoted, and, on the other hand, from the regularly indentured apprentices. It is stipulated in an agreement between the Chicago, Rock Island and Pacific Railway Company and the boiler makers of that road that there shall be two classes of apprentices—regular apprentices and helper-apprentices. The former are to be between sixteen and twenty-one and the latter between twenty-one and twenty-six years of age. It is further agreed that helper-apprentices must have previously served the company for two years as helpers and shall serve in the capacity of helper-apprentices for three years, while regular apprentices shall serve for four years before being promoted to journeymanship.[13]

[11] Constitution, 1910, p. 12.

[12] Annual Report, New York Bureau of Labor Statistics, 1908, Part I, p. 249. This distinction between helpers and apprentices is not observed by electrical workers in all localities. In some places the two terms are regarded as synonymous. Thus in an agreement at Binghamton, New York, it is provided that an apprentice or helper shall serve three years at the electrical business before he shall be allowed to become a journeyman.

[13] Journal of the Brotherhood of Boiler Makers and Iron Ship Builders, March, 1910, p. 167.

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A similar agreement between the Blacksmiths and the Texas and Pacific Railway Company provides that helpers are to be advanced to the position of helper-apprentices, and that one helper-apprentice shall be allowed in each shop and one additional for every five blacksmiths employed.[14] In other localities the workmen corresponding to the helper-apprentices are known as advanced helpers. For example, an agreement between the blacksmiths and the Canadian Pacific Railway Company provides that a helper shall be allowed to take a fire after two years' service and shall be called an advanced helper.[15]

The tile layers sometimes use the term helper-apprentice to designate one who has passed through the lower stages as a helper and is advancing to the ranks of the mechanics. An apprentice system outlined for tile layers in Milwaukee declares that the apprentice is to be known as the helper-apprentice. His duties are to be the same as those of an ordinary helper, except that he is to be allowed to do certain mechanical work and, where the trade demands it, journeyman's work at journeyman's wages.[16]

The failure on the part of labor unions to distinguish the helper from the apprentice, and especially the tendency of unions to class as apprentices all learners of a trade, have led investigators to overlook the real distinction between the two classes of workmen. For instance, Dr. J. M. Motley, in his monograph, "Apprenticeship in American Trade Unions," quotes from the Iron Molders' Journal as follows: "These berkshires were a peculiar institution. They were boys employed by molders to assist them at their work, nominally as helpers, but in reality they were apprentices, and every molder had to use at least one of them."[17] Dr. Motley accepts this statement as correct, and treats the berkshires as apprentices, though they were really helpers. They assisted the molder at his work and were under his

[14] Blacksmiths' Journal, January, 1907, p. 23.
[15] Ibid., March, 1907, p. 20.
[16] Tile Layers and Helpers' Journal, April, 1907, p. 20.
[17] Johns Hopkins University Studies, ser. xxv, nos. 11–12, p. 22.

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direct supervision at all times. The only sense in which they were apprentices was that they were learners of the trade.

Dr. Walter E. Weyl and Dr. A. M. Sakolski, in their study entitled "Conditions of Entrance to the Principal Trades," give warning that "the laborer known as the 'helper' must not be confounded with the apprentice," and then proceed to distinguish the two groups. "The latter [apprentice]," they say, "is generally a youth undergoing a training to become a journeyman. He uses a journeyman's tools and is in most trades permitted to do a journeyman's work. The helper, however, except in a very few trades, receives no instruction and is restricted to certain kinds of unskilled employment. As we have already pointed out, he is not allowed to use the journeyman's tools, and in many trades is not under the jurisdiction of the journeyman's union."[18]

Such broad generalities evade rather than solve the question involved. This confusion is doubtless due to an effort to conform to union usage, which is not at all uniform. Even if judged from that standpoint, the above distinctions are far from correct. In the first place, there is an apparent assumption that helpers are more advanced in age than are apprentices. According to union regulations, apprentices are often taken from the ranks of the helpers, and are therefore older than the helpers. The Boiler Makers and the Machinists provide that as many as fifty per cent of the apprentices may be taken from the ranks of the helpers,[19] and the Printing Pressmen require that all the apprentices be taken from the assistants.[20] In many other trades it is the policy of the unions to have the apprentices drawn from those employed as helpers.

In the second place, helpers are not, as a rule, restricted to unskilled work, but are allowed to pass gradually from the position of an unskilled laborer to that of a mechanic. As

[18] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 768.
[19] Constitution, 1908, art. iii, sec. 1; International Association of Machinists, Official Circular, no. 36, 1913.
[20] Constitution and By-laws, 1903, art. iii, sec. 1.

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will be shown in a later chapter, the unions in a large majority of the skilled trades now permit helpers to progress in their work. In the third place, the distinction based on the kind of tools used is unsatisfactory. In a few trades like stone-cutting and bricklaying the helpers are prohibited from using tools. There are other trades, such as steamfitting, where the helpers do not have tools of their own, but frequently use those of the journeymen with whom they work in order that they may render the assistance required of them. Finally, the criterion of union jurisdiction is invalid, since practically all unions now extend their jurisdiction over both helpers and apprentices.

Dr. Weyl and Dr. Sakolski also state that "the essential distinctions between this [helper] system of promotion and that of apprenticeship are that no formal instructions are given the 'helper' and no definite period of training is required."[21] The same criticism also applies here. Helpers, in order that they may execute their work, must be given some instruction, though it may not be given with a view to making the helper a mechanic. Moreover, in certain trades where the unions make no provision for apprentices—unless helpers are considered apprentices—journeymen are supposed to give helpers instruction. Finally, as to a definite period of training, with the exception of the Elevator Constructors and the Blacksmiths not a single instance has been found where a union representing a skilled handicraft has made provision for helpers to become mechanics without specifying the time they are to serve as helpers. A typical case is the requirement of the Steam Fitters that "Helpers transfering to a Fitters local branch will be required to show that they have worked at least five years at the trade."[22]

Since all these distinctions are inadequate, resort to definition is again necessary in order to obtain our bearings for future discussion. A helper has been described for guidance in this study as any person employed to help the skilled journeyman or journeymen under whose supervision he

[21] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 712.
[22] Constitution, 1908, sec. 39.

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works. On the other hand, an apprentice is one who, by promise, indenture, or covenant, for a specified time, is being taught the trade by a master of the trade or some one in his employ. The only essential distinction between the two classes according to these definitions lies in the purpose of employment. The helper, though he may be a learner of a trade, is primarily employed because he supplies an economic need, and in fixing his wages nothing is deducted for instruction given. On the other hand, an apprentice may assist a journeyman, but the primary purpose for which he is engaged is that he may be taught the trade, though he may incidentally supply an economic need.

(2) In large manufacturing establishments, owing to the minute division of labor, there are many occupations, and consequently many classes of journeymen, some of whom are subordinate in rank to others. It now remains to distinguish a subordinate workman who is a helper from one who is not a helper. Dr. Weyl and Dr. Sakolski in the study previously referred to say: "Progression within a trade permits a boy to move from the simpler to the more complex operations at a rate commensurate with his diligence and dexterity, thus giving those who have extraordinary ability or who apply themselves earnestly to their work an opportunity to pass rapidly through the various stages of apprenticeship. Consequently the so-called 'helper system' of entrance to a trade, as we shall explain later, is more adapted to modern conditions than the apprenticeship system. By the 'helper system' is meant the process of 'moving up' the person desiring to become a proficient mechanic in a trade or occupation. The 'helper' as a beginner does the simpler kinds of work, but as he gains experience he gradually acquires sufficient application and proficiency to enable him to work upon the more complex processes of the craft."[23]

Evidently the writers of the above have failed to discern one of the essential marks of a helper, which is his subjec-

[23] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 712.

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tion, to some extent, to the authority of a fellow-workman. Since certain industries are composed of several branches or trades wherein are many laborers who are subordinate in rank to other workmen, but who are not in any way under their supervision and who are gradually promoted to higher positions, it is obviously incorrect, or at least misleading, to term the helper system a "moving up" process.

The distinction between a helper and a workman who progresses from one of the lower to one of the higher trades of an industry composed of several branches or trades can be best shown by a comparison of these two classes of workmen as they appear in two different trades. In the pottery industry a "jiggerman," for instance, contracts to do work at so much a dozen pieces. Instead of doing all the work of making the finished product himself, he operates a jigger—a machine for shaping and pressing the articles manufactured. A "batter-out" cuts off the clay, flattens it, and places it on the mold so that the jiggerman can proceed with his work. A "mold-runner" takes the molds containing the green ware from the jiggerman and carries them to the dry room, and later, after removing the ware, he brings the molds to the batter-out for use again. These subordinate workmen, the batter-out and the mold-runner, are helpers to the jiggerman, for they assist him at work considered as a unit, are under his supervision, and are responsible to him for the proper performance of their respective duties.

In the manufacture of boots and shoes the different processes are not considered a unit. Piece work is done, but by the piece is meant the performance of a single operation rather than the production of a completed article. All workmen are hired by the firm and are responsible in no way one to another. Cutting, fitting and shaping, finishing and treeing are processes independent of each other. A person engaged in one of these operations is in no sense a helper to one performing a different operation. In both the pottery and the boot and shoe industry there is a moving up of the brightest and most capable workmen. In one case those moved up are helpers, in the other case they are not.

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The policies of organized artisans with reference to helpers vary widely according to the different conditions in the different trades and according to the particular class of helpers under consideration. For convenience and clearness in presentation, union policies and questions connected therewith will be discussed in separate chapters under the following heads: (1) the uses of the helper; (2) the hiring and compensation of the helper; (3) the organization of the helper; (4) the helper and trade-union policy.

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CHAPTER I

The Uses of the Helper

The remote helper, as defined above, ordinarily receives little attention from the unions representing the more skilled trades, with respect either to employment or promotion. This is due to the fact that the unions and the employers are in agreement as to the functions of this particular class of helpers. The unions favor their employment because it relieves the mechanic of unskilled and ofttimes arduous labor without working any immediate harm to the union. The employers wish to use these helpers for the very simple reason that it is more economical to have low-grade work performed by a cheap class of workmen than by high-priced mechanics. Especially is this true of those trades in which the mechanic by working alone would lose much time in changing from one kind of work to another, or would cause expensive machinery to stand idle. In fact, by tacit consent of the unions and the employers the use of the remote helpers has been so regulated that there has been little necessity for specific union rules. For example, the hod-carrier is such a well-established factor in supplying the bricklayer with material, and so seldom shows any disposition to become a bricklayer, that the question concerning his employment or non-employment does not even arise. The bricklayer would not for a moment think of carrying his own brick and mortar, nor would the contractor think of allowing him to do so. The rarity of the instances in which this group of workmen are referred to in union conventions and in labor periodicals attests their insignificance as a union problem.

However, in a few trades where there is a tendency for the remote helper to encroach upon the work of the journeymen

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there is union opposition to his employment. Thus in New York City, for a period prior to the year 1903, owing to the fact that there had been so much trouble over helpers of all classes, the plumbers' union insisted that journeymen plumbers should carry all fixtures to their place of erection regardless of the number of floors such fixtures had to be carried.[1] It has been the policy of the United Brotherhood of Carpenters and Joiners to minimize the number of laborers on any job. This is partly due to the fact that the carpenter, in many instances, can better select the material which he needs for a specific purpose. The main reason, no doubt, is that the use of helpers tends to develop "saw and hammer carpenters," whose presence in large numbers decreases the demand for skilled carpenters and is a source of no little trouble to the union.

The explanation as to why the remote helper is more likely to encroach upon the work of the carpenter than upon the work of the bricklayer lies in the fact that the duties of the carpenter and the carpenter's laborers are more diversified than are the duties of the bricklayer and the hod-carrier. Where the work of this class of helpers, as well as the work of the mechanic, is specific there is less danger that such helpers will make inroads upon the work of the craftsman than there is in trades where the duties of each class cannot be so definitely outlined.

Some unions which represent an industry rather than a trade embrace within their ranks all the workmen of the industry, both skilled and unskilled. In such cases the remote helper, while a member having equal rights and privileges with more advanced workmen, is not a factor of special concern. Thus, the general help about a mine, a carriage and wagon factory, and many other similar establishments, while numerous, does not figure prominently as a distinct group of workmen which calls for special union regulation.

Union policies with reference to the employment and the

[1] Annual Report, New York Bureau of Labor Statistics, 1908, Part I, p. 262.

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promotion of the helpers proper[2] are far from uniform in the different trades. This lack of uniformity is due, as in the case of the remote helper, to the fact that the employment of helpers is more inimical to the welfare of the journeymen in some trades than in others. Unions may be divided into three general classes: (1) unions which demand the employment of helpers; (2) unions which are practically indifferent as to the employment and promotion of helpers, and leave the matter entirely in the hands of the employers; and (3) unions which recognize evils in the helper system, and either try to abolish it or place strict limitations upon the employment and activities of helpers.

(1) In a few trades where the nature of the work is such that helpers lighten materially the physical duties of journeymen without threatening positions or wages, the employment of helpers is not only encouraged, but is often demanded by the unions. For example, a teamster has much harder work to perform when working alone than when he is supplied with a helper who, under his direction, does a large part of the loading, unloading, and carrying of heavy material, and performs other manual drudgery. The driver of an ice wagon keeps the accounts with his customers and attends to all other business matters connected immediately with the distribution of ice. In short, he is a business go-between for the employer and the customers. In addition to the driving of the team, the driver also does other manual labor, such as the blocking out of the ice, but the carrying of the ice from the wagon to the customers is usually done by the helper. This helper, while assisting the driver, readily learns traffic rules, location of streets, and the names of customers. Consequently, if his personal characteristics and his business and educational qualifications are suitable, he is soon capable of becoming a driver.

Two facts, however, keep the teamster's helper from being regarded as a menace by the driver. In the first place, there are many other persons besides helpers who could

[2] In the remainder of this study the term helper is used in the sense of helper proper.

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readily take charge of teams if there should be a disagreement between an employer and his drivers. In the second place, many helpers are negroes or illiterate white men, whose lack of qualifications keeps them from becoming teamsters. Naturally, then, the teamsters desire helpers, for by using them they have much to gain and little to lose. Because of the great diversity in the number of helpers needed by the teamsters connected with different industries, the national union has no rule as to the number of helpers which shall be furnished. It is the policy of local unions to demand helpers in sufficient numbers that the drivers may not be burdened with excessive physical labors. Moreover, as already indicated, the Teamsters, while favoring the promotion of helpers to fill vacancies in the ranks of the drivers, do not maintain any definite policy as to this, the matter of promotion being left entirely to the employers.

In certain industries where many grades of workmen are employed, and where anything approaching an apprentice system would be impracticable, the unions favor the employment and the promotion of helpers. For instance, in certain branches of the iron and steel industry the men work in teams composed of a definite number of workmen of whom the "underhands" are helpers.[3] In addition to these regular helpers, the union often demands that extra help be furnished for work which is especially heavy. Thus, Local Lodge Number 84 of the Amalgamated Association of Iron, Steel and Tin Workers demanded that "help be given to heaters and catchers on all piles weighing 160 lbs. and upward."[4] Similarly, Local Union Number 13 asked that "when working blooms or piles weighing 275 lbs. and over, on muck mills, the firm shall furnish extra help for hooking and straightening."[5] It is the desire of the leaders of the Iron, Steel and Tin Workers that helpers be promoted in regular order according to time of service, provided the

[3] Proceedings, Amalgamated Association of Iron, Steel and Tin Workers, 1877, p. 30.
[4] Program, 1889, p. 17.
[5] Ibid., p. 20.

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skill and capabilities of those longest in service justify such promotion. However, no definite stand has been taken by the association on the question of promotions since the early days of the union. Advancement of workmen is for the most part left to the employers. The work of the helper is, when possible, made very definite, but this is not done to hamper in any way his opportunities to secure a higher position, but rather to make all work more systematic, and thus avoid confusion and misunderstandings.[6]

It is the common experience that helpers are a source of trouble in unions which seek to enforce an apprentice system. This is because a helper proper who works in close contact with a mechanic learns the work of the one whom he assists and thus comes into conflict with the apprentice regulations. Consequently such unions are more or less hostile to the unlimited employment of helpers. There are, however, some exceptions. For instance, in the blowing of glass bottles it is understood that blowers shall be supplied with a "mold boy" and a "cleaner-off." The mold boy operates the molds into which the glass is blown, and the cleaner-off removes the particles of glass that adhere to the blower's rod. The intimate relation of these helpers to the blowers does not give them any considerable insight into the art of glass-bottle blowing, because the blowing process requires muscular movements which are invisible and consequently can be learned only by actually doing the work. The chasm between the blower and the helper is so broad that the helper cannot cross it at a single leap, nor can the process of blowing be divided so as to afford stepping-

[6] Thus in the Proceedings of the Fifteenth Convention, p. 2974, the work of the melter's helpers is outlined as follows: "The first helper shall help charge, make bottoms, clean and sharpen bars, help dig out tapping hole, tend gas and reverse furnace as often as directed by melter. First helper shall assist second helper at the top hole when closing.

"The second helper shall bring in ore, help charge, help dig out top hole, clean and close tapping hole, bring in and properly prepare ferro manganese, and bring in limestone, clean and sharpen bars and see that furnace tools are taken care of. He shall take any ore and manganese left from heat back to their bins, also keep the charging floor swept clean around middle front door."

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stones on which he can cross. Accordingly, the bottle blowers do not oppose the use of helpers, nor do they, as a rule, lay down specific regulations as to the work of the helper. Doubtless another reason for the attitude of the bottle blowers with respect to their helpers is the fact that they work by the piece. If they themselves should do all the low-grade work, such as operating the molds and cleaning the pipes, it would tend to decrease their earnings. It would be difficult to maintain, for the entire process of making bottles, a standard rate as high proportionally as is maintained for the skilled process of blowing.

Just as it is to the interest of the blowers to have helpers, so it is to the interest of the employers, as long as blowers are plentiful and the standard rate is maintained, not to put on blowers who are inexperienced, for owing to the slowness of an unskilled blower and to the fact that he turns out many faulty bottles, the employer, by putting on his helpers as blowers at the standard rate, would get smaller returns for the wages paid to such helpers working as blowers. This is because the helpers as well as the blowers would waste time in making many worthless bottles. Since a helper's pace is set by the blower whom he assists, it is to an employer's interest to use the best blowers obtainable. Consequently, although the blowers do not allow the promotion of any helpers other than those who become regular apprentices, no difficulty is experienced in maintaining the rule.

(2) The industries represented by the unions which are comparatively indifferent to the employment and the promotion of helpers include industries in which many grades of laborers are employed. In such industries, on account of the multiplicity of occupations and the constant change brought about by the introduction of new machinery, occupational lines are not tightly drawn, and the unions give their attention to other issues, leaving largely to the employers all questions pertaining to the division of work and the employment and promotion of workmen. Consequently,

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though helpers are employed, no friction is generated thereby, and their existence is scarcely recognized in the union journals and convention proceedings. For example, the Western Federation of Miners makes eligible for membership "all persons working in and around the mines, mills and smelters. . . ."[7] In this list of workmen are many classes of helpers, such as trackman's helper, blacksmith's helper, and smelter's helper. Yet from reading the constitution of this union, one would not know of their existence.

(3) The unions in which the questions relating to the employment and activities of helpers have been of the greatest concern and in which there has been more or less action designed either to abolish the system or to restrict the number and advancement of helpers are the following: Blacksmiths, Boiler Makers, Elevator Constructors, Electrical Workers, some branches of the Glass Workers, the Iron Molders, Machinists, Printing Pressmen, Plumbers, Potters, Sheet Metal Workers, Steam Fitters, and Tile Layers. Before taking up the specific policies of these unions it will be well to consider from the union standpoint some of the more characteristic evils growing out of the use of helpers. The chief objections to the existence of a helper class in these trades may be summed up in a single sentence: Helpers are conducive to the disintegration and the overcrowding of a trade.

In the first place, the presence of a helper class in a trade produces or accelerates trade disintegration. It has been the policy of a majority of the unions enumerated above to hold their respective trades intact, and to oppose any grading of work or workmen. The employment of helpers is not favorable to this policy. The introduction of machinery and of machine-made articles has been the great factor in destroying the unity of trades, but the presence of helpers has made possible a grading of workmen. When a division of work is introduced, and there is a class of men

[7] Constitution, art. i, sec. 1.

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competent to take over the less skilled parts of it, the employers will naturally favor such a division. On the other hand, if there are no men in the shop, and especially if there are none connected with the trade except full-fledged mechanics and a limited number of apprentices, it is probable that the union will be able to enforce its demand that the trade shall be held intact, or at least that all the work shall be done by those recognized by the union as full mechanics or as apprentices. The helper proper and the advanced helper would be in a good position to step in and take work which the mechanics claim should be done by mechanics only.

There is this same tendency, so the unions claim, for helpers to encroach upon the rights of journeymen where the work is made up of jobs scattered here and there which require varying degrees of skill. If there is a job of work which a helper can do, a helper rather than a mechanic is sent to do it. Such a policy, if unrestricted, gradually destroys the unity of a trade. From many sources come complaints that this infringement upon the rights of the journeymen is going on. The Blacksmiths, the Boiler Makers, the Machinists, and the Plumbers have had grievances of this kind. President Kelly of the International Association of Plumbers, Gas and Steam Fitters has declared that contractors send jobbers out when they get knowledge enough to do the work. While they could not lay out systems, they can put in closets; and while employers pay them at the rate of six dollars a week, they charge the customers as much for these men as though they had worked fifteen or twenty years at the business.[8]

The unions contend that trade disintegration is responsible for the production of poor mechanics, or, at least, of workmen who can work at only certain parts of the trade. The baneful effects of the helper system in this respect are strongly set forth in the report of Organizer Burke to the

[8] Report of U. S. Industrial Commission, vol. vii, pp. 970–971.

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Plumbers' Convention in 1908. Mr. Burke said that of about four thousand men in Philadelphia engaged in the plumbing and pipe-fitting industry, only about twenty-five per cent were capable of qualifying for admission to the union. Many of them, particularly those about shipyards and locomotive works, were handy-men, who could do one class of work only. Many others worked on hydrants and did street work, but were not skilled workmen.[9] In a similar report of the same year he ascribed like conditions in Harrisburg and other places to the helper system.[10]

It is further contended by union journeymen that the use of helpers in a trade produces a number of poorly trained mechanics far in excess of the demands of the trade. If each mechanic in a trade works with a helper, and if each helper becomes, as he will in most instances, a poor mechanic, the result is extremely annoying to those having at heart the welfare of their craft. The journeymen tend to increase in a ratio exceeding the needs of the trade. Unemployment, low wages, and a depressed trade class are the pernicious results of such a system. In many of the skilled trades this is a stock argument against the unlimited use of helpers. In fact, scarcely an article treating this subject can be found in any labor journal wherein the warning does not appear that the employment of helpers, if unrestricted by the unions, will inevitably produce a surplus of workmen and thus enable the employers to break down the union regulations.

As can be readily seen, these two evils growing out of the presence of a helper class react upon each other. Trade disintegration creates a demand for more helpers and provides a way for them to become journeymen, thus producing a surplus. Similarly, a surplus of journeymen, especially of unskilled ones, materially aids the employers in any effort to divide work and workmen into classes, perhaps largely independent of each other. Formerly, to be a boiler maker,

[9] Plumbers, Gas and Steam Fitters' Journal, June, 1908, p. 8.
[10] Ibid., December, 1908, p. 10.

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a blacksmith, or a machinist meant a definite thing; but now, to be classed as a member of any one of these trades may mean being engaged at any one of many occupations into which each of these trades is divided. For instance, nearly a page in the constitution of the Boiler Makers is devoted to an enumeration of the work falling within the jurisdiction of the Boiler Makers,[11] yet it is a significant fact that a boiler maker usually devotes his time to one, or at least to a very few, of these enumerated occupations.

Even if there were in ordinary times no desire on the part of the employers either to promote helpers or to have them undertake work claimed by mechanics, their presence at certain seasons is likely to prove a menace to the welfare of the journeymen. In times both of slack trade and of trouble with employers the substitution of helpers for mechanics is a standard grievance. "When the times get slack," said the president of the United Plumbers, "they [the employers] are laying off the journeymen and keeping the boys."[12] Instances where helpers took the place of journeymen during strikes are numerous. For example, when Local Union Number 24 of the International Association of Marble Workers went on strike in 1907, the places were taken by the helpers,[13] even though these helpers were members of the international association. The desire of helpers to do advanced work when an opportunity presents itself is hard to overcome, and this makes it more difficult for the mechanics to enforce their demands.

Two general policies have been followed by organized journeymen in their endeavors either to mitigate or to eradicate the evils discussed above. These are (1) the restriction of the helper, and (2) the abolition of the helper.

(1) Various regulations designed to restrict the helper have been tried either by different unions or by single unions at different times. For our purpose, such restrictive policies may be classified as (a) absolute and (b) modified.

[11] Subordinate Lodge Constitution, 1912, art. iii, sec. 3.
[12] Report of U. S. Industrial Commission, vol. vii, pp. 970-971.
[13] The Marble Worker, April, 1907, p. 20.

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By the former is meant the circumscribing of the work of the helper within certain bounds beyond which he is never to go under any circumstances. By the latter is meant the policy of allowing helpers to be advanced in their work according to certain clearly defined rules or regulations. These two policies will now be taken up in order.

(a) In many of the older trades, in which for generations well-established apprenticeship systems existed and apprentice regulations attained such sanctity in the eyes of the journeymen that to violate them was an odious act, the policy of absolute restriction characterized the first efforts of the unions in their endeavors to check the encroachment of the helpers. The idea seemed to be to preserve the apprentice rules in their original purity. If helpers were to be allowed at all, it must be on condition that they remain continuously as helpers at work known as helpers' work. Prominent among the unions which have tried for longer or shorter periods to maintain this policy are the Blacksmiths, Boiler Makers, Iron Molders, Machinists, Marble Workers, Plumbers, Sheet Metal Workers, and Tile Layers. The following are typical examples of rules restricting the work of helpers. The Iron Molders decided in 1876 that "any member can employ a person for the following purposes—to skim, shake out and to cut sand, but for no other purposes."[14] The helper was to be strictly confined to this work and not to be promoted to the status of a journeyman. A former rule of the Boiler Makers was as follows: "Helpers shall be kept strictly to helpers' work."[15]

Realizing the difficulty of confining an employee to work of low grade, especially when it is to the interest of the employer to advance him, the unions have as a rule sought to strengthen the restrictions as to work by hedging them about with additional regulations. A few unions have done this by limiting the helper in the use of tools. For example, in an agreement of Sheet Metal Workers, Local Union Number

[14] Constitution, 1876, p. 35.
[15] Proceedings, 1901, p. 266.

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143, of New York City, with their employers it is stipulated that each employer shall be allowed one helper when necessary, "said helper not be considered an apprentice and must not handle tools."[16] It is obvious that this restriction as to tools is merely to strengthen and enforce the rule that helpers are not to be apprentices, that is, learners of the trade in any sense of the word.

Since it would be difficult to control the work of the helpers if their number were excessive in proportion to the amount of work allotted to them, it has been customary for most unions which pursue the policy of absolute restriction to limit the number of helpers allowed in a shop or on a job. For instance, when the Iron Molders first began their great fight against the use of "berkshires" in the molding industry, they did not deny the necessity for helpers, but opposed their employment by the molders, and especially the employment of an unlimited number.[17]

There are certain obstacles which have prevented trade unions wholly or in part from carrying out the policy of cutting off helpers from every avenue of promotion. These obstacles may be enumerated as follows: (i) the indifference or the hostile attitude of those directly affected by the policy; (ii) the rise of non-union shops in consequence of efforts at strict enforcement; (iii) the desire to extend unionism to unorganized districts; (iv) the lack of a definite line separating the work of helpers from that of journeymen; (v) non-uniformity in enforcement by different local unions; and (vi) the decay of the apprentice system.

(i) The lack of support if not the open opposition of all the classes directly concerned—journeymen, helpers, and employers—prevents the enforcement of absolute restriction.

Three reasons may be assigned for the reluctance of journeymen to aid in enforcing the rules of their unions forbidding the promotion of helpers: the desire of journeymen to exploit fellow-workmen; the desire of skilled mechanics to

[16] Annual Report, New York Bureau of Labor Statistics, 1908. Part I, p. 262.
[17] Motley, p. 24.

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get rid of the rough work of a trade; and the personal friendship existing between mechanics and their helpers.

By allowing helpers to encroach upon mechanics' work, journeymen who are paid by the day are thus relieved of work supposed to be done by themselves. At the Machinists' Convention in 1911, when the helper question was, as often before, under discussion, a delegate said that the trouble was not with the helper or the specialist but with the machinist, who is directly responsible for the advancement of the helper in the shop, ofttimes teaching him to do the work which he is paid as a machinist to do himself.[18]

If the journeymen are paid by the piece, each of them is usually anxious, from motives of self-interest, to have his helper or helpers do as much work as possible. A contracting journeyman is often able to make a considerable profit from his helpers by employing them at a wage much lower than that which journeymen make, and by having them do all the low-grade and perhaps a large part of the more skilled work of the trade. Because of the tendency of iron molders to do this, Local Union Number 1 of Philadelphia as early as 1855 inserted the following provision in its constitution: "Nor shall any journeyman working by the piece be allowed a helper for any other purpose than to make cores, skim and turn out castings unless a majority of the members of this union in a shop in which he may work sign a paper in favor of giving him permission."[19]

Again, journeymen by permitting helpers to do work which is classed as journeyman's work often get out of performing distasteful work. As mechanics become highly skilled, it is natural that they should take pride in confining themselves to that work which gives a certain dignity to the worker. The disposition of journeymen to have helpers do the rougher part of journeymen's work is indicated in the numerous union rules directed at the journeymen rather than at the employers. For example, the Machinists provide that "journeymen members refusing to do any kind of work be-

[18] Proceedings, 1911, p. 148.
[19] International Molders' Journal, November, 1911, p. 825.

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longing to the trade simply because it may be rough or dirty shall be subject to a fine or expulsion."[20]

It happens not infrequently—so state many trade-union leaders—that union regulations designed to restrict helpers to unskilled work are violated by journeymen who for some reason have a personal interest in their helpers. This personal interest may be the result of family or neighborly relations, or of long and intimate association. Speaking on this point,[21] Secretary Reynolds of the International Union of Ceramic, Mosaic and Encaustic Tile Layers and Helpers said that the tile layer and his helper travel from place to place together; that they become intimate, and that the journeyman frequently allows his helper to do work forbidden by the union. This same personal interest often induces a mechanic to secure for his helper admission to full union membership.

The persons most active in obstructing the enforcement of union regulations forbidding the promotion of helpers are the employers, who naturally claim the right to classify the work of their establishments and to promote deserving employees. Consequently, they resent the demands of the unions that such and such work be set aside as helpers' work and that no helper ever be promoted to journeymanship. The National Metal Trades Association, for example, makes this statement in its declaration of principles: "Since we, as employers, are responsible for the work turned out by our workmen, we must have full discretion to designate the men we consider competent to perform the work and to determine the conditions under which the work shall be prosecuted, the question of the competency of the men being determined solely by us."[22] The National Association of Manufacturers declares that, "in the interest of the employers and the employees of the country, no limitation should be placed upon the opportunities of any person to learn any trade to which he or she may be adapted."[23]

[20] Subordinate Lodge Constitution, 1911, art. vi, sec. 4.
[21] Interview with the writer.
[22] The Review, March, 1914, p. v.
[23] Proceedings, 1903, p. 166.

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The third class of persons who hinder the enforcement of the union policy of absolute restriction upon the promotion of helpers consists of the helpers themselves. It is the deep interest of the helpers in their own welfare that makes the execution of union rules pertaining to the promotion of helpers distinctly different from the enforcement of most union regulations. Such rules, for example, as those having to do with the hours of labor and the sanitary conditions of the shops concern directly two classes only,—the employers and the employees as a body, and the extent of the enforcement of these rules is the resultant of two more or less contending forces. On the other hand, the extent to which a rule restricting the privileges of assistant workmen is enforced is the resultant of three distinct forces, as in such matters the employees are no longer a unit, but are divided into two distinct groups. If a local union, for instance, in any trade demands an increase of ten per cent in wages, the success of their demand depends upon the views of the employers as to the desirability of the increase or upon the comparative strength of the employers and of the employees as a whole. But if the same union demands that helpers be confined to certain work, the outcome of the demand is rendered more uncertain by reason of the fact that the helpers oppose it.

It is natural that every workman should seek to obtain that employment which will bring him, other things being equal, the greatest money return for the labor expended. Every helper, therefore, seeks opportunity for advancement in his trade or industry. If the employer offers him a position which carries with it a larger wage than he has been accustomed to receive, he will in all likelihood be anxious to grasp the opportunity. Especially will he be likely to do this if by so doing he gets rid of performing unskilled work. If the journeymen go on a strike to enforce the rule that helpers be confined to helpers' work and never be promoted to journeymanship, those helpers who are semi-skilled mechanics will probably act as strike breakers, for such an

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occasion presents them with the opportunity for rapid promotion.

In trades where the helpers are unorganized there is little or no pressure that can be brought to bear on them by the unions to secure conformity to helper regulations. The auxiliary workmen, being independent of the unions, do not fear the loss of union privileges and benefits, nor are they much influenced by appeals to support the cause of labor. This point will be more fully developed in a later chapter on the organization of the helper.

If helpers are organized and stand in some relation to the journeymen, or even if their organization is independent of the journeymens' unions, there is a possibility that fear of the loss of the journeymen's support may induce caution in violating the rules of the union of which the helpers are a part or upon which they rely for support. Sometimes helpers will even enter into agreements with journeymen which retard the advancement of the helpers. For example, the Mosaic and Encaustic Tile Layers and the Hexagon Labor Club of the Tile Layers' Helpers of New York City agreed "that a member of the Hexagon Labor Club shall accompany a tile layer on all jobs within a radius of two hundred miles of this city under penalty of $25.00 for the first offense and $50.00 for the second offense, each job worked without a member of the Hexagon Labor Club to be an offense. Also the helpers will not be allowed to handle tools, to lay tiles or to back up facings under similar penalties. No strike shall be ordered on account of this agreement until after a conference with a committee of the bosses."[24] By limiting their membership and by securing the assistance of strong local unions of mechanics in enforcing the closed shop, organized helpers may obtain advantages which offset restrictions upon their promotion. Experience in most trades, however, shows that when chances for promotion come to helpers they will accept them and risk the consequences.

[24] Journal of the Knights of Labor, May 2, 1895, p. 2.

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(ii) The second obstacle to the enforcement of a policy of absolute restriction is the tendency of that policy to produce non-union mechanics. Intelligent helpers working in intimate contact with mechanics will, to some degree, learn the arts of the craft, however difficult the work may be. If such helpers are not given some hope of future betterment, they become indifferent, if not actually hostile, to union interests, and drift into non-union ranks as opportunities offer. In times of business activity or of threatened strike, these non-union men recruited from the helpers are a force to be reckoned with in maintaining union rules. In short, absolute restriction shuns one danger only to fall into another. If these helper-trained mechanics are admitted to the union in order to enforce demands upon the employers, the rule that helpers shall not become journeymen is violated. On the other hand, if the helpers are persistently denied union privileges, they form a reserve force by means of which the employers are able to dictate terms. A writer early stated with reference to helpers in iron molding that if a molder rebelled against a reduction of prices, his oldest buck would take his place. This reduced molders to a state of serfdom.[25]

(iii) The extension of unionism as an obstacle to the carrying out of the policy of absolute restriction is closely connected with that of the creation of non-union shops. Helpers in union shops go into non-union territory and secure employment as journeymen. Later, when the union seeks to extend its jurisdiction to these new fields, it is virtually obliged to take in all workmen found engaged as mechanics. The secretary of the Tile Layers says that in 1913 he organized a lodge of tile layers at Dayton, Ohio, and that every member of that lodge had formerly been a helper in some other teritory, but not one of them had ever before been recognized by the union as a competent mechanic.[26]

Self-preservation may force a union to disregard its policy in individual cases where a helper goes neither into a non-

[25] Iron Molders' Journal, January, 1877, p. 194.
[26] Interview with the writer.

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union shop nor into new territory. If a helper is promoted contrary to union regulations and the conditions are such that the local lodge does not wish to resort to strenuous measures to nullify such promotion, it must extend the privileges of membership to the helper thus promoted in order to keep control of the work over which it claims jurisdiction.

(iv) The fourth obstacle to the enforcement of the policy of absolute restriction is the difficulty found in drawing a line between the work of the helper and that of the journeyman. In some trades there is a natural division of work between the mechanic and his helper. In the blowing of glass bottles there is no difficulty in determining the respective duties of a journeyman, a mold boy, and a cleaner-off. In other trades, as of a machinist or a blacksmith, it is well-nigh impossible to tell just where the work of the helper ends and that of the mechanic begins. Rules to the effect that helpers must be kept at helpers' work are here difficult to enforce, with the result of gradual encroachment on the part of the auxiliary workmen upon the indefinitely defined work of the journeymen.

This encroachment of the helper is increased when shop conditions are changing by reason of the introduction of new machinery and of new processes of work. If a new machine replacing handwork is introduced, the question will frequently arise as to whether the operation of the machine by an employee previously a helper is a violation of the union policy and of the union agreement that helpers must not be promoted to mechanics' work. The unions will claim that the operation of the machine belongs to the workmen whom the machine has displaced. The employers, on the contrary, may desire to have the machine operated by a cheaper workman, probably a former helper who is willing to work for less than the minimum union rate for journeymen. The usual result is to force the union to extend its jurisdiction over all the work of the shop, and thus to open its doors to workmen previously declared ineligible for union

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membership. A circular sent out by the general office of the Blacksmiths in 1902 admits that helpers, especially in shops using much machinery, can with little practice do a large part of the work of a smith, and that "the drop-hammer forging machines, bolt-header, bulldozer and other machines have gradually but surely robbed the blacksmith of his individuality and made him a specialist."[27] Similar changes in the machinists' trade, which have made it difficult to define machinists' work, led the president of the International Association to recommend that the union admit to membership all workmen in machine shops.[28]

(v) The fifth obstacle to the enforcement of union rules forbidding the promotion of helpers and their entrance into the union as journeymen is that non-enforcement in one locality may prevent enforcement in another. With respect to the necessity for uniform enforcement, a trade-entrance requirement differs from other union regulations. If a national union should enact an eight-hour rule for all its members, non-enforcement in some localities would not necessarily prevent enforcement in others. On the other hand, if a national union have a rule that no helper shall be promoted to journeyman's work or admitted to union membership as a journeyman, and if a part of the local unions do not enforce the rule, its effect is largely destroyed, since helpers admitted to membership in one local union cannot as a rule be denied the privilege of transferring their membership. The power of a national union to keep helpers from being promoted and admitted to the union as journeymen is measured by the power or the willingness of its weakest local unions in this respect. The unions which have adopted the policy of absolute restriction have made vigorous if often ineffectual efforts to force all local unions to respect the trade-entrance regulations.

(vi) Finally, the decay of the apprentice system is an obstacle to the enforcement of the policy of absolute re-

[27] Proceedings, 1903, p. 15.
[28] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 689.

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striction. It is not my purpose to enter into a discussion of the decline of this system of training mechanics. It is sufficient to say that with the coming of the modern industrial system apprentices have disappeared in many trades, even though the name still survives and, as has been seen, is applied to different classes of auxiliary workmen. Since apprentices are few in American trades, the ranks of the mechanics must be filled from other sources, one of the most fruitful of which in certain trades is the group of auxiliary workmen employed therein. For example, Mr. Perry, a stove manufacturer of Troy, New York, arguing for the use and the promotion of helpers in iron molding, said: "I do not use the term apprentices, for the reason that none exist in our trade, nor have they ever existed within my remembrance."[29]

(b) The failure of the rigid plan of absolute restriction has led most unions to adopt more liberal policies—policies not adopted, as a rule, through any benevolent motive, but in order to control the helper and to advance the interests of the journeyman. The Blacksmiths, Boiler Makers, Electrical Workers, Elevator Constructors, Glass Workers, Machinists, Potters, Printing Pressmen, Plumbers, Steam Fitters, and Tile Layers have at various times made provision whereby helpers might under certain conditions be advanced to the position of journeymen. This has usually been an attempt on the part of the unions to bring their policy into conformity with actual conditions. That unions have accepted, in modified form, the system which had forced itself upon them is illustrated by the experience of the Blacksmiths' International Union.

In 1902 a circular sent out by the general office of the Blacksmiths' Union referred to the fact that helpers in machine shops readily become smiths, and that daily complaints were received to the effect that helpers were being put on fires at lower rates than were paid smiths.[30] A year later Mr. O'Connell, in rendering a decision in a jurisdic-

[29] Quoted in the Iron Molders' Journal, May, 1877, p. 327.
[30] Proceedings, 1903, p. 15.

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tional dispute between the International Brotherhood of Blacksmiths and the Allied Metal Mechanics, said: "My knowledge of the blacksmith's trade leads me to believe that the blacksmith's helper is the apprentice to the blacksmith's trade . . . for as a general rule there are no apprentices in the Blacksmith's trades except the helper who is looking forward at all times to the day when he will stand behind the anvil as a blacksmith."[31] By referring to the Blacksmiths' constitution it is seen that no provision was made whereby a helper could become a smith. The constitution of 1899 merely declares that "no helper shall take a fire unless he receives the same wages paid the blacksmith."[32] In 1905, however, there was added to the elaborate apprenticeship regulations the following clause: "Local unions shall do all in their power to abolish the apprentice system and helpers shall be advanced according to merit."[33] The failure to restrict the helper thus led to the complete abandonment of the apprentice system and to the legalization of the prevailing method of admission to the trade. With the exception of the readoption of an apprentice clause to satisfy lodges in the South, where helpers are in the main negroes, the International Brotherhood of Blacksmiths has continued to encourage the promotion of the helper.

Prominent among the few unions which still hold out against the promotion of helpers on any terms is the International Association of Marble Workers. This union furnishes an excellent example of the reluctance of organized artisans to give up their policy of absolute restriction even though the policy is not enforced. Joseph McCulloch, a business agent of the Marble Cutters and Setters' Union, stated in his testimony before the Industrial Commission in 1901 that the marble setters are mainly recruited from the ranks of the marble setters' helpers.[34] Yet a study of the constitutions and the convention proceedings of the Inter-

[31] Proceedings, 1903, p. 18.
[32] Art. xiii, sec. 3.
[33] Constitution, 1905, art. xiii, sec. 3.
[34] Report of U. S. Industrial Commission, vol. viii, p. 216.

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national Association of Marble Workers reveals the fact that this union has rejected proposition after proposition providing that helpers be recognized in some degree. Although resolutions on this question have been offered at almost every convention, a few typical examples will show how determined are the Marble Workers that helpers shall not be encouraged by the union to become mechanics.

In 1906 Helpers' Local Union Number 15 petitioned the Marble Workers for some recognition of the helper's right to become a marble setter. They contended that when the supply of setters in any city became exhausted, instead of admitting questionable and undesirable men into the setters' local union, helpers of experience should be advanced to the position of improver. This very modest request of the helpers was refused.[85] Again, in 1911 an amendment to the rules of the International Association was offered to the effect that in localities where no shops exist or where the shops employ a total of two apprentice cutters or less, a helper who had worked at his branch of the trade three years or more should, when the demand for setters and cutters was greater than the supply, be given the privilege of making application to the local union of cutters and setters for membership.[86] This amendment was not adopted.

Finally in 1912 the following resolution was presented to the Marble Workers' convention: "In a locality where there is plenty of marble work and marble setters cannot be secured, in order to stop the people not belonging to the I. A. M. W. from doing marble work a helper who has been a member of the I. A. M. W. for four years shall be given a weekly working card from setters to set marble until any number of setters get out of employment, then let the helper go back to helping but after the helper has had one year's experience at setting marble he shall be issued a marble journeyman setters' card."[87] This resolution was referred to the committee on constitution, and after a few minor

[85] Proceedings, 1906, p. 12.
[86] Proceedings, 1911, p. 20.
[87] Proceedings, 1912, p. 188.

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amendments had been made it was referred to the local unions for a referendum vote. Secretary Hogan of the International Association says that practically all the helpers voted for the resolution and all the journeymen against it. Since the number of journeymen in the union greatly exceeds the number of helpers, the resolution was lost.[38]

After a union has once recognized the helper as a possible journeyman, the next step is to work out a definite scheme by which the evils involved in the promotion of helpers may be minimized. Two plans have been followed in this particular. One has been to make the promotion of helpers supplemental to the regular apprentice system in vogue in a particular trade; the other has been to adopt an exclusive helper system of promotion fashioned as nearly as possible after the customary apprentice system.

At the present time the Boiler Makers, Glass Workers, Machinists, Potters, Printing Pressmen, and Tile Layers are pursuing the plan of promoting helpers to the position of apprentices. The International Association of Boiler Makers requires that "fifty per cent of the apprentices shall be taken from the ranks of the helpers, local conditions to govern, providing such helper be a member in good standing in the local union of the helpers of this Brotherhood and has actually worked two years in the service of the company to which he is to serve as an apprentice. Oldest helpers in point of service must have preference."[39] The Machinists by a recent referendum vote decided that helpers are eligible to become apprentices.[40] The International Union of Ceramic, Mosaic and Encaustic Tile Layers and Helpers provides that "all helpers must serve at least four years as an I. U. helper before becoming an improver,"[41] and that "all improvers shall come from the ranks of the helpers' locals affiliated with the I. U."[42]

[38] Interview with the writer.
[39] Subordinate Lodge Constitution, 1908, art. iii, sec. 2.
[40] Constitution, 1913, art. i, p. 57.
[41] Constitution, 1912, art. xiii, sec. 5.
[42] Ibid., art. xxi, sec. 3.

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Likewise among the Window Glass Workers[43] and Printing Pressmen[44] and in certain branches of the pottery industry[45] it is the policy of the unions to have all apprentices taken from the ranks of helpers and assistants.

As a means of mitigating the evils incident to the use of helpers in those unions seeking to maintain apprentice regulations, this plan of having a part or all of the apprentices drawn from the helpers is regarded as possessing distinct advantages over the policy of absolutely forbidding the promotion of a helper to work classed as journeyman's work. In the first place, it tends to conciliate the helper and thus to prevent the growth of a hostile spirit toward the organized journeymen. If helpers are given some opportunity for advancement, however slight that opportunity may be, it will have an effect in keeping them from violating union regulations. By obeying such regulations a helper may hope that some day he will receive union assistance in his efforts to gain recognition as a journeyman. On the other hand, if he violates the union regulations he is brought into union disfavor and cut off from all aid in his efforts to become a journeyman or to better his condition.

Again, this policy hedges in and strengthens the regular apprentice system in that it provides for a longer period of training for those entering the ranks of the journeymen. It also limits more narrowly the field from which apprentices, so called, may be drawn. The Tile Layers require that helpers serve four years in order to become improvers, and that improvers serve two years in order to be eligible for membership as journeymen. This makes the full period of learning the trade six years, and limits very narrowly the source from which both improvers and journeymen can be drawn. There is the further advantage that an apprentice regulation of this kind will secure the aid of the helpers in

[43] Proceedings, 1906, p. 136.
[44] Constitution and By-laws, 1903, art. iii, sec. 1.
[45] Wage Scale and Agreements between the United Association of Potters and the National Brotherhood of Operative Potters, 1911, p. 16.

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preventing employers from getting improvers or apprentices from any source except the helpers.

It has been the continuous policy of the Steam Fitters, the Elevator Workers, the Potters—in certain branches of the industry—and lately the Blacksmiths to allow the promotion of helpers, and to restrict their employment and promotion with limitations similar to the ordinary apprentice regulations, as well as with the additional requirement that a helper must stand an examination before a committee of journeymen before he shall be recognized as eligible for journeymanship. Thus, the International Association of Steam, Hot Water and Power Pipe Fitters and Helpers provides that "each Local Branch of Steam Fitters shall have a trade test or examining board to examine into the mechanical ability and moral character and physical condition of all candidates seeking admission to membership as Steam Fitters. No Local Branch of Steam Fitters shall accept an application unless the applicant can show he has worked five years at the trade."[46] Likewise, an electrical worker's helper must serve four years before he is allowed to take an examination for promotion.[47] The Blacksmiths provide neither for a definite time of service nor for an examination, but merely make provision that "helpers shall be advanced according to merit."[48]

The essential thing in the provisions of all the unions for the promotion of helpers without an additional period of service as apprentices is that the whole matter is placed in the hands of the examining committee or of the organized journeymen. This is a departure from the customary mode of dealing with apprentices, who are usually not required to undergo the ordeal of an examination.

The question naturally arises as to the reason for this distinction. Why do unions which recognize the helpers as the legitimate learners of their respective trades demand that the helpers be required to take an examination to test

[46] Constitution, 1908, sec. 32.
[47] Constitution, 1909, art. vi, sec. 1.
[48] Constitution for Local Unions, 1912, art. xiv, sec. 3.

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their fitness for journeymanship, while those unions which recognize only apprentices as the learners of a trade as a rule make no such requirement? Why does the International Brotherhood of Blacksmiths, for example, provide that apprentices shall become smiths when they have served four years, but at the same time very indefinitely provide that "helpers shall be advanced according to merit"?[49] Again, why is it that the United Association of Journeymen Plumbers, Gas Fitters, Steam Fitters and Steam Fitters' Helpers provides that plumbers' apprentices shall serve an apprenticeship of five years,[50] but that steam or sprinkler fitters' helpers must pass a satisfactory examination before they can become eligible to membership?[51] It cannot be because journeymen are in a position to know the efficiency of the apprentice better than they do that of the helpers; for, if anything, helpers work in closer contact with journeymen than do apprentices. It is not that the unions which promote their helpers do not keep in close touch with them and consequently know nothing of the time served as helpers, because all such unions register their helpers and keep complete account of them by methods similar to those of other unions in keeping track of their apprentices. The extent to which this is sometimes done is shown by the following rule of the International Association of Steam Fitters: "Helpers must be affiliated three years with the local they were initiated into before they are entitled to transfer to another local of helpers."[52]

There are two possible explanations of the differences existing in the promotion of helpers and of apprentices. The first is that among helpers there are often many mature men who have never learned any trade and are unlikely ever to be desirable candidates for membership as journeymen. Such being the case, an examination is the most practical way of separating the desirable candidates from

[49] Constitution for Local Unions, 1912, art. xiv, sec. 3.
[50] Constitution, 1910, sec. 117.
[51] Constitution, 1910, sec. 138.
[52] Constitution, 1908, sec. 33.

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those not wanted. With the apprentice it is different. As a rule only a few apprentices are taken in a shop, and they are taken in primarily to learn the trade. It is possible to exercise much discretion in their selection. If capable and earnest boys are chosen, it is more than likely that at the end of a specified apprenticeship period they will be fit for entrance to journeymanship.

The second reason for this distinction, and perhaps the more plausible one, is that there is more danger of overcrowding a trade by a helper system of preparation than by an apprentice system. Extra precautions are therefore necessary in order to prevent such a surplus of workmen. That the examination of helpers desiring to become union journeymen is designed to limit the number entering the trade rather than primarily to test the skill of the candidate is suggested by the numerous complaints that are made by contractors to this effect. The dissatisfaction with the union examining board frequently terminates in a decided stand against accepting the union decisions as to who is prepared to do mechanics' work. Thus the Master Steam Fitters of St. Louis made the following rule: "Any fitter having been rejected by the examining board of the union, shall be examined by a committee of the M. S. F. A., and if found competent shall be permitted to work in any shop that will employ him."[53] That the Steam Fitters' board had been rejecting capable mechanics seems probable, for the Master Steam Fitters would hardly have wanted to employ inefficient men and pay them the standard rate of wages. A special report of the United States commissioner of labor states as to the steam fitters that "the contractors complain very much that there are not enough union workmen for the work that should be done in the busy season. They claim that the union intentionally keeps its membership low, and that the means of doing this is by making the conditions of the examination such that new men can not pass it."[54]

[53] Report of U. S. Industrial Commission, vol. vii, p. 949.
[54] Eleventh Special Report of the Commissioner of Labor, p. 375.

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That there are some grounds for these claims of the employers is confirmed by the dissatisfaction of helpers with the rules providing for their promotion. The Tile Layers appear to be more liberal in their treatment of helpers than most unions, yet there is much dissatisfaction among the helpers of this trade with the limited opportunities for promotion given them by the local unions. A member of the helpers' lodge of tile layers at Pittsburgh, writing in the Tile Layers' journal, protests against the hampering of the tile layers' helpers by the tile layers.[55] Another writer, presumably a helper, says that according to the present system, helpers remain helpers for years before they can become journeymen.[56] Even the president of the Tile Layers pleads that the helpers be given fair play, asserting that the journeymen too often look after their own interests to the detriment of the helpers.[57]

It is pertinent to ask why there should be any likelihood of there being too many mechanics from the union point of view if helpers are promoted, or why extra precautions are considered necessary if a helper instead of an apprentice system of trade entrance prevails. The answer is found in the circumstance that if workers are primarily engaged to learn a trade and only incidentally assist a journeyman, it may be easy to dispense with such assistance and to limit the number of apprentices to conform to the needs of the trade, but if workers are primarily employed to assist journeymen and incidentally learn the trade, such limitations as to number are not ordinarily practicable. The Steam Fitters, for instance, would like to diminish the number of helpers in proportion to the number of journeymen on a job, but, recognizing that each fitter needs a helper, they simply seek to conform to the following rule: "A journeyman Steam Fitter shall be entitled to one helper only."[58]

[55] Tile Layers and Helpers' Journal, November, 1906, p. 12.
[56] Ibid., April, 1912, p. 12.
[57] Ibid., June, 1905, p. 8.
[58] Constitution, Local Union No. 120, Cleveland, 1912, art. iii, sec. 6.

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From the union point of view here lies the peculiar evil inherent in a helper system of promotion to a trade as contrasted with an apprentice system. If it be acknowledged that a helper is an essential factor in the performance of the duties of one mechanic, it may be argued that every mechanic should be supplied with a helper. It might also be reasonably argued that if one helper at the end of a certain time of service as a helper shows efficiency and is advanced to journeymanship, all helpers fulfilling the same requirements should likewise be advanced. But if all journeymen should have helpers and all helpers should in a certain time become journeymen, the result would be a serious dislocation of union policies.

An editorial in the official journal of the Plumbers for February, 1904, argues as follows along this line: "Taking up the rule that every plumber should have one helper, and that the helper should serve four years, let us see what the result would be in about eight years. Figuring that there are 200 plumbers in a city, each one with a helper, in four years there would be 200 more plumbers. There would be 400 plumbers in a city that hasn't use for over 215 or 220. In another four years there would be 800 plumbers in a city that has no use for more than 250 or perhaps 300." This wholesale method of recruiting a trade will by the law of supply and demand crowd down wages, with all the evils incident thereto.

This same danger is voiced by a writer in the Steam Fitters' journal: "Generally speaking, the helper of today is the steam fitter of tomorrow, and I would suggest that steps be taken as soon as practicable whereby a method will be adopted providing for a system of apprenticeship. . . . If something is not done to regulate the number of young men desiring to learn our trade, eventually there will be a large surplus on the market."[59]

In order to restrict more narrowly the numbers entering a trade and to keep helpers from doing journeymen's

[59] Communication in Proceedings, 1907, p. 13.

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work, the unions adopting the helper system of trade entrance have sought in some form or other to limit as rigidly as possible the number of helpers employed in a shop or on a job. An agreement between the Steam Fitters and their employers in Washington in 1900 provides that "no steam fitter shall work more than one helper on pipe ranging from three and one-half inches down, and two helpers on pipe ranging from four inches upwards."[60] A similar agreement between the master and the journeymen plumbers of McAlester, Oklahoma, stipulates that no shop shall be allowed more than one registered helper, who shall not handle tools except when working with journeymen.[61]

In adopting regulations to govern the number and the promotion of helpers, trade unions have in a large measure sought to limit the number of journeymen and have given only slight consideration to the needs of particular employers or to the skill of the helpers. Such regulations have been difficult to enforce. Any rule limiting the advancement of helpers interferes with the interests of journeymen, employers, and helpers as individuals, and will meet disregard, opposition, and evasion. Moreover, as in the case of absolute restriction upon the promotion of helpers, the rigid enforcement of a modified policy is hindered by the disposition of the unions to organize all shops in union territory and to extend unionism into every field where members of their respective crafts are employed.[62]

(2) Inability to keep the helper within certain prescribed limits or to formulate a scheme for his promotion has led a few national unions, notably the Plumbers and the Iron Molders, to deny the right of employers to use helpers at all. In 1894, after the Plumbers had been debating the helper question for years, a writer in the Plumbers' official journal asserted that helpers had been a most important factor in bringing about the demoralization of the trade, and that a solution of the helper question would solve many

[60] Proceedings, 1900, p. 52.
[61] Plumbers, Gas and Steam Fitters' Journal, July, 1908, p. 13.
[62] See above, pages 37–45.

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other questions which were a matter of concern to the plumbers.[63] From this time attention began to be centered on the abolition of all helpers. Various rules have since been passed designed to make effective the policy of getting rid of the helper class. This policy is clearly set forth in the resolution passed at the national convention in 1897 that where there was no conflict with previous agreements all helpers and apprentices should be abolished.[64] The fight against the use of helpers was waged on two grounds, namely, that the helper is not needed, and that the proper regulation of the system is impossible.

As to the first, it has been contended that plumbers seldom need assistance, and that when assistance is necessary it is in every way better to have two journeymen work together than to use one journeyman and a helper. It is even claimed that the use of helpers tends to foster laziness in the journeyman. It is quite evident that this argument as set forth by the Plumbers has very little force. It was almost unknown until it was decided that helpers were a menace to the welfare of the union; moreover, it is contrary to human nature for a body of workmen to desire to get rid of assistants on no other ground than that they are not needed.

The real cause for the Plumbers' desire to abolish all helpers lies in the fact that the nature of the trade is such that it is difficult to regulate their work and advancement. As a prominent plumber, Mr. Rogan of Minneapolis, has said, "The only proper solution of the helper question is not to have any helpers at all."[65] The effect of the helper system in producing a surplus of workmen and in causing trade disintegration is seen at its greatest in the plumbing trade. This can best be understood by contrasting this trade with another trade which is very much like it,—steam fitting.

[63] Plumbers, Gas and Steam Fitters' Official Journal, April, 1894, p. 8.

[64] Proceedings, 1897, p. 73.

[65] Plumbers, Gas and Steam Fitters' Official Journal, October and November, 1906, p. 77.

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In the first place, plumbing is predominantly an industry of small shops. There are, of course, large jobs requiring contractors of considerable capital and responsibility; but a great part of the plumbing of a city consists of small jobs,—putting in a single closet, sink, or bathtub. These small jobs, together with a large amount of repair work, afford a means of livelihood for the master plumber with little capital, and offer a field of work for the low-grade mechanic. If each plumber has a helper and if each helper becomes a journeyman, the trade will be speedily overcrowded and unemployment will result. This unemployment will lead to the establishment of more small shops, for it is no great undertaking for a plumber having a kit of tools to open a small establishment of his own. Again, if the helpers are prevented by union rules from entering the trade as union members, they drift into small non-union shops or contribute to the establishment of more of like size. In either case, the helpers find their way into the trade and increase the number of journeymen. The existence of these low-grade shops renders organization difficult, decreases the stability of bodies already organized, and makes collective bargaining uncertain. In short, it results in the general depression of the trade.

In steam fitting there is not the same likelihood that so many small shops will be established. Steam fitting jobs are usually the installation of large plants, work upon which is done as a unit. The contractor must possess some capital and must be a man of considerable responsibility. The absence of conditions favorable to the establishment of small shops places the Steam Fitters in a position to control their trade. If helpers become dissatisfied with the treatment accorded them by the journeymen, they have few small non-union shops into which they can go, nor can they profitably set up as masters.[66]

[66] The Baltimore business agent of the International Association of Plumbers, Gas Fitters, Steam Fitters and Steam Fitters' Helpers states that in Baltimore there are about 800 plumbing shops, 15 of which are union, and that about 10 steam-fitting establishments, all union, do practically all the steam fitting in the city.

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Again, plumbing is more liable to disintegration and to a grading of work than is steam fitting. Even if there were not so many small contractors in the plumbing business, the helper would be a dangerous factor from the standpoint of the journeymen plumbers. When calls come for low-grade construction or for repair work, it is more than likely that a helper, provided one man can do the work, will be sent. As a result, the helper and the poorly trained mechanic often find employment while mechanics of higher grade are idle. In steam fitting, inasmuch as the work is of a more uniform character and is done on the average for a higher class of buildings, there is not the same tendency either to grade work or to send the poorer workers to the job.

In iron molding there are similar possibilities of trade disintegration growing out of the helper system. For years the Iron Molders' Union has sought to get rid of the helpers known as berkshires. A discussion of the berkshire system and the policy of the union in connection therewith will be taken up with the question of the payment of the helper, for the two questions are indissolubly connected.

Obviously, a union which is opposed to the promotion of helpers proper will also be opposed to the employment of advanced helpers, for it is from the former class of workmen that the latter is recruited. Conversely, a union which provides for the promotion of helpers proper to an intermediary position, as before explained, provides for the employment of advanced helpers. Union policies with reference to the advanced helper who is allowed to become a journeyman have been already sufficiently set forth in connection with the consideration of the helper proper. The policy of the unions is to limit very strictly the number of such helpers.

Organized journeymen in a few trades have allowed, though reluctantly, the employment of advanced helpers of a different kind, that is, helpers who are not permitted to become journeymen. This policy has been adopted in order

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to avoid competition with such men as non-unionists and to provide for unionizing the helpers without giving them recognition as full mechanics. This is the type of advanced helper who works at certain jobs within a trade, often independently of the supervision of a journeyman. The handy-man or specialist, as this type of workman is usually called, is very likely to be employed in those trades which are capable of a minute division of labor. In the machinists' and the boiler makers' trades in particular the handy-man has been a troublesome factor. Though these unions provide for the organization of the handy-men, they have always wished if possible to eliminate them. As President Gilthorpe of the Boiler Makers says: "We are working to eliminate the middle man or the handy man."[67]

The policy of abolishing all helpers is more difficult to enforce than the other policy previously described. The journeymen themselves stand in the way. This is due (a) to the desire of artisans to perform only skilled work, and (b) to the desire of individuals to be in positions of authority.

(a) When a man becomes in a high degree skilled in his trade, he is strongly inclined to restrict his work to the more skilled and technical parts. He takes delight in doing that which others cannot do or which they can do only with great difficulty. In addition to satisfying his desire to do skilled work only, he obtains greater remuneration for his services if he is engaged at all times in work which requires expert craftsmanship. It is obvious that if an employer can afford to pay a certain amount for the production of an article, it becomes possible for the skilled artisan to obtain a higher wage when the low-grade work is performed by a cheap workman than when he does all the work. These motives have contributed to the increase of the number of helpers in many trades, and consequently have been great stumbling blocks to unions in their efforts to restrict the number of helpers or to abolish the system.

The editor of the Plumbers' official journal, in com-

[67] In letter to the writer.

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menting on the disposition of journeymen to demand a helper, said that some journeymen think they ought to have a boy to carry their overalls around and to shine their tools for them.[68] Organizer Burke of the Plumbers declared that "we have no one to blame but ourselves as the journeymen all around this eastern country are too lazy to carry their kits. The majority want a boy with them all the time. In some cases, I have known our men to quit when they were refused a helper."[69] The president of the International Association of Machinists said: "You will notice from the report on strikes that we have had several strikes against the introduction of the 'handyman' system. The employers are not to blame for this in all cases, for now and then we find instances where the machinists refuse to do a certain class of work. As a result the employer is forced to employ whoever he can to do the rough and dirty work."[70]

In harmony with the above statements are the following expressions from prominent employers. John S. Perry, a former stove manufacturer of Albany, in commenting on the berkshire system, said: "From time immemorial, previous to the formation of the molders' union, it was a custom almost without exception for a molder to employ at least one helper and not unfrequently two and even three. It would then have been considered a hardship if they had been denied this privilege."[71] A Chicago employer said that his firm used as many handy-men as they would if they ran a non-union shop. By way of explanation he said: "We find that while machinists may object to handymen doing the work for which they are competent, they themselves do not wish to do this class of work, and in this case have dropped their complaints if told that they would have to do it if they did not allow the handymen to do it."[72]

(b) Closely connected with the wish of a man to do skilled

[68] Plumbers, Gas and Steam Fitters' Official Journal, February, 1906, p. 2.
[69] Ibid., December, 1908, p. 10.
[70] Machinists' Monthly Journal, June, 1903, p. 486.
[71] Iron Molders' Journal, May, 1877, p. 326.
[72] Eleventh Special Report of the Commissioner of Labor, p. 221.

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work only is the desire to control and supervise other workmen, thereby exalting his own importance. A writer in the Iron Molders' Journal in 1873 made this statement: "Let us pay a visit to a carwheel shop. What do we find? Two men working together: one is a molder, the other is a helper. Between them they do two days' work. The helper prepares the chill, inserts the pattern, does all the ramming, and the molder finishes the mold: but if it is blue Monday, the molder lays back on his dignity, and the helper becomes both molder and helper for the day."[73]

Employers are emphatic in the assertion of their right to employ any number of helpers and to promote them as they see fit. One of the principles of the National Metal Trades Association, stated in 1902 and still maintained, is that "the number of apprentices, helpers and handymen to be employed will be determined solely by the requirements of the employer."[74] The National Founders' Association in its outlined policy asserts in similar terms that "the number of apprentices, helpers and handymen to be employed will be determined solely by the employer."[75]

While such declarations voice the spirit of independence characterizing an employing class, there are nevertheless strong economic reasons why employers should wish not to be restricted in the employment of helpers. Helpers may be a source of profit to the employer by enabling him to economize in the use of labor, by supplying a sufficiency of labor in times of general trade activity, and by saving the duplication of machinery.

In trades where the character of the work is such that one or more persons must work together, or where work cannot be divided into skilled and unskilled parts but must be performed as a unit, employers usually favor the use of helpers. Their contention is that in such cases work can be done as well and as quickly by one skilled craftsman working in con-

[73] October, 1873, p. 132.
[74] Report of the President of the Machinists, May 1, 1902, p. 5; The Review, April, 1913, p. 53.
[75] The Review, May, 1913, p. 55.

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junction with one or more helpers as by two or more expert mechanics. Likewise, if it is possible to divide the work of a trade into skilled and unskilled parts, it is usually to the employers' interests to make such a division of work and to employ labor corresponding in skill to the work to be done. Thus it is expensive for contracting plumbers and steam fitters to have heavy material carried to the place of construction by journeymen who receive from four to five dollars per day. In a difficulty between the master and the journeymen steam fitters of St. Louis one of the points at issue was the right of the master fitters to employ such labor as they saw fit to move and place heavy material of any description.[76]

It is to the interests of the employers to use helpers whenever such use will enable high-priced mechanics to continue uninterruptedly at highly skilled work. Thus Mr. Perry, speaking for the stove manufacturers, said: "A large portion of the flasks require two persons to 'lift off' and to 'close,' consequently if there are no helpers the molders are subject to constant interruptions in assisting each other, and thus much valuable time is needlessly lost by skilled workmen."[77]

Another important consideration with employers is the elasticity given to the supply of workmen by the helper system. There are ordinarily in a city only a sufficient number of journeymen to meet the usual trade demands. When a rush comes on and the supply of journeymen is exhausted, the employers may advance their work by employing more helpers and having them do the less skilled parts of the work which are sometimes performed by full mechanics. In a season when building is very active, master plumbers often desire to employ helpers to take from the journeymen all the labor possible, in order that a contract may be finished within a specified time. At a national convention of Master Plumbers in 1885 one of the delegates said that the fluctuations of their business are of such a nature that from neces-

[76] Report of U. S. Industrial Commission, vol. vii, p. 949.
[77] Quoted in the Iron Molders' Journal, May 10, 1877, p. 326.

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sity young men must for a longer or shorter period of time be employed as helpers for the journeymen.[78]

In some industries manufacturers claim that by using helpers they are often saved the cost of duplicating machinery and patterns. Mr. Perry, who has been previously quoted, stated in this connection that such aid was important to the manufacturer. A molder working alone can put up thirty of the larger pieces of a stove, while the demand for these might be, say, forty pieces a day. With a helper he might put up forty and save duplicating patterns. Thousands of dollars have been saved in this way.[79]

The unions have been far from successful in their efforts either to restrict the number of helpers to the usual number of apprentices or to abolish them entirely. The United Brotherhood of Plumbers has perhaps fought the employment of helpers more zealously than any other union, but it has made little headway in the accomplishment of its purpose.

In 1896 the Plumbers passed stringent rules with regard to the employment of apprentices, and since a helper was considered as equivalent to an apprentice, the same laws were extended to helpers.[80] Inasmuch as the local lodges had not, as a rule, been enforcing the provisions of the national union with respect to helpers and apprentices, the following regulation was adopted: "Any local union failing to enforce these laws after said date shall for the first offense be fined $50.00 and after the lapse of four weeks if not enforced shall forfeit their charter in the United Association."[81] At the next annual convention only two local unions claimed to have lived up to the rules.[82] From Massachusetts it was reported that two lodges had attempted to carry out the regulation. These two local unions had gone out on strike, and now appealed to the national association for financial assistance.[83]

[78] Proceedings, 1885, p. 181.
[79] Iron Molders' Journal, May 10, 1877, pp. 326-327.
[80] Constitution, 1897, p. 25.
[81] Ibid., art. xv, sec. 7.
[82] Proceedings, 1897, p. 68.
[83] Ibid., p. 71.

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In the next year, 1897, the Association went on record in favor of doing away with both helpers and apprentices.[84] The action of the convention in 1899 indicated that the regulations of 1897 must have proved ineffective, for again the regulations were changed. This time it was provided that the executive board of the Plumbers should designate a number of local unions which should do away with helpers and apprentices.[85] In 1902 the president of the Plumbers said: "During the past year gratifying progress has been made by a large number of our locals eliminating the helper and the establishment of a proper apprentice system. . . . We shall continue our efforts to abolish the unnecessary helper."[86]

In 1904 the president of the Plumbers again reported progress in restricting the employment of helpers, but added: "In several cities where our local unions have been working entirely without helpers, attempts have been made within the past year by the employers to return to the former custom. . . . The reduction of the number of helpers, I believe, is of more importance to the future welfare of our members than is the question of increase of wages."[87] There must have been considerable dissatisfaction with the progress made, for all the rules then in force were dropped and a new rule was adopted which left the helper question largely in the hands of the local unions.

While the United Association has not changed its regulations in regard to helpers since 1904, the elimination of the helper has by no means been accomplished, and still continues to be one of the important topics at the national conventions of plumbers. For instance, at the convention of 1906 there was a lengthy discussion as to whether the convention should take definite action on the helper and apprentice question or refer it to a joint committee of journeymen

[84] Proceedings, 1897, p. 73.
[85] Constitution, 1899, p. 26.
[86] Plumbers, Gas and Steam Fitters' Official Journal, October, 1902, p. 25.
[87] Ibid., October, 1904, p. 29.

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and master plumbers. In the course of the discussion one delegate said that he did not think it possible to eliminate the helper because "the public would not stand for it." Another delegate said that the helper laws never had been enforced.[88] Finally, it was decided to leave the matter to a joint committee. This committee met at Indianapolis in 1908, but nothing was accomplished.[89]

It thus appears that the Plumbers have made little progress in their efforts to abolish the helper. For instance, in New York prior to the year 1903 the Plumbers had insisted on carrying all fixtures to the floors where they were to be used, but an agreement in this year between the master and the journeymen plumbers provided that porters should do work of this nature. It was also agreed that no helpers or apprentices should be hired from 1903 to 1908,[90] but by a new agreement, made in 1908, each plumber is allowed one helper and no term is specified for a helper to serve before he becomes eligible as a journeyman. When a helper considers himself competent, he may apply through his employer for an examination before the joint examining board of master and journeymen plumbers. If successful in the examination, he is rated as a first-class man and becomes a member of the journeymen's association.[91]

A few local unions have been successful in their struggle against the employment of helpers. In Chicago in 1899, by an agreement between the master and journeymen plumbers, helpers were eliminated.[92] President Burke of the United Brotherhood of Plumbers declares that at the present time the union shops of Chicago employ no helpers other than those who are regular apprentices.[93] While a few other

[88] Proceedings, 1906, p. 77.
[89] Plumbers, Gas and Steam Fitters' Official Journal, February, 1908, p. 9, December, 1908, p. 43.
[90] Eleventh Special Report of the U. S. Commissioner of Labor, p. 362.
[91] Annual Report, New York Bureau of Labor Statistics, 1908, Part I, p. 184.
[92] Plumbers, Gas and Steam Fitters' Official Journal, April, 1899, p. 8.
[93] Interview with the writer.

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unions have from time to time reported the passing of the helper, it is evident from the foregoing discussion that on the whole but little progress has been made by the Plumbers in this direction. The other unions which have tried to restrict very narrowly the number of helpers employed or to eliminate them entirely have had essentially the same experience as the Plumbers.

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CHAPTER II

The Hiring and Compensation of the Helper

The problems involved in the hiring and compensation of helpers are most clearly exhibited in those unions wherein the piece system of pay and the employment of helpers prevail. At the time of the organization of the Iron Molders' International Union the jurisdiction of the journeymen molders extended to all the work of a shop. It included the skilled work of preparing and finishing the molds and also such unskilled work as attending the crane, carrying flasks, tempering sand, skimming the molten iron, and taking out castings. The molder did not, however, attend to all of these varied duties himself. What was known as the berkshire system prevailed in most shops. Each molder, acting largely under pressure from the employer, engaged one or more "bucks," or berkshires, to assist him, and paid them from his own earnings.

Before the organization of the International Molders' Union there was much opposition by the various local unions to the berkshire system. Thus in the initial constitution of the Journeymen Stove and Hardware Molders' Union of Philadelphia, organized in 1855, there is found the following provision with regard to helpers: "No member of this union shall take a boy to learn the trade (unless it be his natural or adopted son), nor shall any journeymen working by the piece be allowed a helper for any other purpose than to make cores, skim and turn out castings, unless a majority of the members of this union in which he work, sign a paper in favor of giving him permission."[1]

From the first the International Molders' Union opposed this system. Its efforts were directed to (1) the abolition

[1] International Molders' Journal, November, 1911, p. 825.

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of the prevailing system of hiring and paying the helpers, and (2) the abolition of all helpers proper and the establishment of a definite line between the work of the molders and that of the remote helpers. The attainment of the first of these ends was deemed necessary to the accomplishment of the second, which was the real consideration.

(1) The early attitude of the Molders toward the employment of berkshires was phrased as follows: "We desire here and now to say that it is against the spirit and intent of the law, is against justice and common sense, is, in fact, unconstitutional for any member of the Iron Molders' International Union to employ a helper and pay him out of his earnings. No helper can be employed unless paid by the proprietor of the shop, and no piece molder can run a helper, whether employed by himself or his employer."[2] In the constitution of 1876 it took the form of an outright prohibition: "No member working by the piece can employ a helper and pay him out of his (the molder's) wages."[3] This same constitution declares that "an employer demanding of molders that they shall work bucks shall constitute a lock out if indorsed in accordance with law."[4] The attitude of the Molders' Union toward the employment of bucks as indicated above has never changed. If less is heard about the opposition now than formerly, it is because the system has been for the most part abandoned.

When Secretary Kleiber of the International Molders' Union was asked why the Molders objected so strongly to the system, he replied in substance that such a system brings out all the selfishness, all the niggardliness, in the molders, with the result that the interests of the craft are sacrificed to personal interests. A further consideration of the system will explain what is here implied. In the first place, the payment of the helper by the molder tends to lessen the amount of work to be done by the skilled molder, and to overcrowd the trade more than is the case where the helper is paid by the

[2] Iron Molders' Journal, October 1, 1873, p. 133.
[3] P. 35.
[4] Ibid.

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firm and all work is done by the day instead of by the piece. In other words, the evils of a helper system are accentuated when the journeyman assumes the role of employer. A molder agrees with his employer to work at so much a piece and pay his own helpers. The greater the amount of relatively unskilled work the molder has done by helpers, the more time he can give to the highly skilled work and consequently the greater his remuneration. But, in reality, by encouraging molders to give over a large part of their work to helpers, the amount of employment open to journeymen is decreased, with a consequent decline in the rate of wages. Again, the helpers, if allowed to encroach upon the more skilled parts of molding, learn the trade; then, if the wages paid them by the molders are not to their liking, they set up as molders themselves and thus increase the supply of journeymen.

The union view has been summed up as follows: "The system now in full force in Buffalo was the almost universal system in 1855–59, from one to five 'Bucks' for every journeyman; wages were being rapidly reduced; every reduction was followed by the journeyman hiring another buck. Molders were made about four times as fast as the necessities of the case or increase of the trade called for. Molders became so plentiful that all sorts of odious rules could be enforced with impunity."[5]

(2) Payment of helpers by the molders and their control by the molders have been so intimately associated that it is impossible to consider them as distinct problems. Suffice it to say that any attempt to limit the work of the helper and yet allow the molder to employ and pay him has been found impractical, for as long as a journeyman has an assistant paid by himself, he will exploit the helper to the fullest extent possible. On the other hand, it is unsatisfactory to have an employer pay a helper and place him under the control of a journeyman who is working by the piece, for it would be to the advantage of the molder to have the helper

[5] Iron Molders' Journal, October, 1873, p. 11.

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do as much work as possible, thus inducing the evils above described.

The policy of the Molders has, therefore, consisted of two parts. They wished to have all helpers paid by the employers, and they wished to withdraw the helper from the direction of the molder, confining his work to definite and specific tasks.[6] In carrying out this policy they met opposition and evasion on the part of many journeymen. This is indicated in the numerous resolutions introduced in the national conventions providing for modifications of the rigid rules against the use of berkshires. For example, at the thirteenth convention of the International Union the following resolution was offered but rejected: "Resolved: That any member working by the piece on work that he is obliged to use the crane, shall be allowed to hire a helper to do all of his laboring work."[7] Though the union remained firm in its policy at all times, "many of the older members complained bitterly, and evaded the intent of the regulation by adopting a boy, for the union recognized the right of the journeyman to teach the trade to his own or adopted son."[8]

In like manner the employers resisted the efforts of the union to change or modify the prevailing system of work. For almost a half century there was a continuous struggle between the union and the employers on the berkshire question, involving strikes and lockouts. Gradually the berkshires were eliminated. In 1899 President Fox of the International Union reported that "the Berkshire system exists in very few of the stove shops today, and I believe the day is near at hand when it will pass away entirely."[9] Frey and Commons state that the berkshire system was entirely abolished before 1904.[10] As far as the writer has been able to determine, this statement is correct. Secretary Kleiber of the Molders' Union says that to the best of his knowledge the

[6] Iron Molders' Journal, October, 1873, p. 131.
[7] Proceedings, 1876, p. 54.
[8] Motley, p. 24.
[9] Proceedings, 1899, p. 5.
[10] "Conciliation in the Stove Industry," in Bulletin, U. S. Bureau of Labor, no. 62, January, 1906, p. 176.

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berkshire system has been completely abolished in the United States in both union and non-union shops.

The abolition of the berkshire system does not mean that helpers have been done away with in the iron-molding industry. Even in the best regulated union shops helpers called "laborers" are employed to do such work as the carrying and the tearing down of flasks, and in a general way getting materials and implements ready, in order that the molder may continue uninterruptedly at the more skilled processes of molding. At times these laborers serve as helpers proper to the molders. For instance, a laborer or helper is assigned to each molder to assist him in carrying the molten iron and pouring it into the molds. In shops where heavy machinery and car wheels are molded, helpers, paid by the firm, work in intimate contact with the molders at practically every stage of the work.

In 1902 in a conference between the representatives of the Iron Molders' Union and the Stove Founders' National Defense Association, the following agreement was made with reference to helpers: "The general trend of industrial development is towards employing skilled labor, as far as practicable, at skilled work, and in conformance with this tendency every effort should be made by the members of the S. F. N. D. A. and the I. M. U. of N. A. to enable the molder to give seven hours of service per day at molding, and to encourage the use of unskilled help to perform such work as sand cutting and work of like character, when the molder can be given a full day's work."

The practice of promoting helpers to the position of molders has not ceased with the disappearance of berkshires. In shops where small castings are made the work of the helper is so remote from that of the molder that helpers have little opportunity to learn the more skilled processes of molding. In such cases the apprentice system prevails. In shops where large castings are made the helper system has completely displaced the training of apprentices. In establishments turning out a large variety of work such helpers

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as show a special aptitude for molding are promoted to high-grade work, while other helpers are confined to the lower grade.

Early in the history of the iron industry in this country the boiler or puddler and the roller were recognized as having full charge of the work in their respective departments. They hired the necessary helpers and paid them. This practice was so universal that when the iron workers first organized, this system of hiring and paying the helper was accepted without question. With the introduction of the manufacture of sheet iron practically the same plan of employing helpers was adopted. Thus the system of employment was established throughout the industry.

The problems arising in connection with such a contract system of work are quite different in the manufacture of iron and steel from what they are in iron molding. This can easily be seen from the following considerations: First, the employment and payment of helpers by journeymen in the manufacture of iron and steel does not lead to an increase in the number of helpers as it does in the case of molding. A boiler or puddler, for instance, will turn out a certain product each day and can use to advantage a certain number of helpers, but to increase this number would not increase his output and would therefore be a financial loss to him. Second, an increase in the number of molders is more practicable than an increase in the number of puddlers. If helpers become efficient molders, it is an easy matter for the employers to find places for them as journeymen; but if helpers in the manufacture of iron and steel become capable of taking charge of furnaces or of rolls, journeymen's jobs cannot so easily be provided for them. The output of a mill is relatively inelastic and cannot be increased by the simple addition of more workmen. Third, the number of molding establishments is much greater than is the number of iron and steel mills, consequently there are greater opportunities for a helper in a molding shop to obtain employment as a journeyman in another. Fourth, helpers in

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the manufacture of iron and steel are for the most part employed because it is physically impossible for journeymen to prosecute their work without assistance. On the other hand, helpers are employed in a foundry—except where large machinery is cast—because of the advantages of a division of labor, and they could be dispensed with.

Since the nature of the iron and steel industry makes necessary a certain number of helpers, and at the same time makes it difficult for helpers to encroach upon the work of the journeymen, it is natural that the helpers should be considered as the rightful learners of the trade and that no apprentice system should be established by the union.[11] Thus the employment and compensation of the helper can be studied as a problem, apart from the encroachment of the helper upon the work of the journeymen and from his effect on an established apprentice system.

The chief question which concerned the Iron, Steel and Tin Workers in connection with the employment and payment of helpers has not been who shall hire and pay them, but how much shall they be paid and how shall uniformity be secured in the wages of helpers doing similar work. As early as 1870, one of the leading topics at the convention of the United Sons of Vulcan was what proportion of the wages received by a workman should be passed on to his helpers. A petition submitted to this convention proposed that helpers' wages "shall be uniform, and that no more than one-third shall be paid one Helper, nor more than one half of what the furnace makes shall be paid to two Helpers."[12] The committee to which this proposition was referred spoke of it as "a good one, and one long desired—one that your Committee would be much pleased to see in successful operation everywhere. But to make it uniform through the action of this National Forge would be impracticable. Wages of

[11] In the early days of the union some restrictions were placed upon the promotion of helpers. Thus in 1881 the Association passed the following resolution: "Each puddler helper must help one year and be six months a member of the Association before he be allowed the privilege of boiling a heat" (Proceedings, p. 682).

[12] Vulcan Record, vol. i, no. 6, 1870, p. 20.

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Helpers have been, and we presume will be, controlled by circumstances, as they exist in respective localities. If all were a unit upon the subject, its successful inauguration could be hoped for; but as certain localities have certain rules upon the subject, we can barely expect much uniformity—hence the impropriety of adopting any measure at present looking to that end. That a Helper should receive more than one-third, no reasonable person would assert, for when we consider that the Helper is as it were, an apprentice learning the business, one-third is ample; and by a strict adherence to this policy, the Helper himself would derive the full advantages of his trade, when completed to take charge of a furnace. But your Committee would commit the subject to the consideration of the various Subordinate Forges, suggesting that they adopt such regulations relative thereto, as the circumstances will warrant."[13]

This report was adopted, but it led to no definite action, and the same subject continued to be prominent at all conventions of the National Forge. The "one-third and five per cent" rule was gradually adopted in the various districts, and finally became a regulation of the Amalgamated Association.[14] Since then, rules have been adopted for the uniform payment of helpers in all departments.

While the union has accepted the customary mode of paying helpers, there has been a tendency in recent years to drift away from this method and to demand that all helpers be paid by the firm. There are two assignable reasons for this. In the first place, payment by the journeyman is inconvenient to both helper and journeyman. In the second place, with such a system it is difficult to maintain a uniform wage rate for helpers doing the same class of work. Even though the union fix a rate for the payment of all helpers, such a scale is difficult to enforce. If the helpers are not members of the union, as was true in the case of the United Sons of Vulcan, they felt in no wise bound to abide by the

[13] Vulcan Record, vol. i, no. 6, 1870, p. 20.
[14] D. A. McCabe, "The Standard Rate in American Trade Unions," in Johns Hopkins University Studies, ser. xxx, no. 2, p. 63.

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union scale for their payment. Since the contractors or heads of the various teams are practically compelled to have help, in times of general activity when labor is scarce the helpers are likely to force from their employers a higher rate than provided for in the union scale. On the other hand, if times are dull and help is plentiful, the journeymen contractors will be inclined to take advantage of their superior bargaining power, and will pay helpers less than is provided for by the union. With helpers as members of the union, this violation of the union scale is checked only as far as helpers refuse to break the laws of their organization. With so many employers, competition is sure to produce variable and non-uniform wages for helpers. Especially is this true since evasion is difficult of detection, being known only to the two parties to the wage contract. When the helper is paid from the office such evasion is made more difficult. The rate of pay for all helpers is inserted in the wage scale, and the only way of violating it is by rebate paid to the head of a team or by additional wages paid to the helper.

While the union favors the payment of all helpers by the firm, it does not favor the hiring of the helpers by the firm. For years there has been a clause in the national constitution providing that "all men are to have the privilege of hiring their own helpers without dictation from the management."[15] Since each workman is in close personal contact with his helpers, and since each workman is responsible for the work done by the team of which he is the head, the union deems it advisable to give every man the privilege of selecting his own assistants. This plan of allowing the men to choose their own helpers gives the journeymen a strong leverage for drawing helpers into the union and forcing them to accept the wage rate provided for helpers.

Another union which has taken an active stand against the payment of helpers by the journeymen is the Glass Bottle Blowers' Association. One of the principal questions be-

[15] Constitution, 1912, art. xvii, sec. 21.

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fore the first convention of Glass Bottle Blowers in 1856 concerned the new method of work then being introduced, namely, the system of having blowers hire their own helpers. This practice was condemned as an infringement upon the apprentice system, and the convention passed a rule that no blower should employ a helper for less than the standard rate of wages.[16] Two years later the convention adopted the further resolution: "We will not work in any factory with anyone who has a molder or finisher or an assistant in making bottles or vials or for other purposes than gathering glass, except such assistant be a regular journeyman or apprentice to the business."[17] This policy prevailed, and it has been customary for a long time for the helpers in bottle factories to be paid by the manufacturers.

The Window Glass Workers have also gone on record as opposed to the payment of helpers by journeymen. The by-laws of 1908 provide that "no flattener shall be allowed to pay any part of layer-out's wages, or any help that may be employed about the flattening house."[18] At the convention of this same year the following resolution was adopted: "That it be the sense of this convention that the firms should pay the snappers' wages." The manufacturers appear to have accepted this rule with little dissent.[19]

In striking contrast with the unions above discussed, the United Brotherhood of Operative Potters has never taken a positive stand against the hiring and the paying of helpers by the journeymen. For example, the journeyman jigger-man hires and pays his batter-out, his mold-runner, and his finisher. This system prevails universally in the pottery industry, and though there has been no serious opposition to it, the Brotherhood of Operative Potters in 1912 proposed to the Western Manufacturers' Association that contract labor should be abolished in all branches of the trade.[20]

To the journeyman potter the most unsatisfactory phase

[16] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 749.
[17] Ibid., p. 750.
[18] Constitution and By-laws, 1908, art. xvii, sec. 44.
[19] Joint Scale of Wages, November, 1903, to June, 1904, sec. 25.
[20] Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 751.

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of the system of contract work is that a standard wage for helpers has not proved successful. The helpers refuse to join the union of the journeymen employers and are therefore under no obligations to accept a standard rate of pay determined by the union. The helpers are always ready to higgle for higher wages; and since journeymen must have helpers to carry on their work profitably, they too become higglers. As a result the wage scale for helpers is continually violated and the journeymen's wages are uncertain in amount.

That the hiring of helpers by journeymen has not caused as much dissatisfaction among the potters as in some other trades is doubtless because pottery factories are so localized that they are well under union control and because the nature of the industry is such that there is an exact division of work. This fixes definitely the number of helpers to be employed, and prevents the gradual transfer of the journeymen's work to the helpers. Moreover, the growth of potteries in the United States has been rapid, and the large number of learners has not tended in the same degree to lower wages.

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CHAPTER III

The Organization of the Helper

Labor organizations in the United States have been formed largely in accordance with the theory that trade rather than industrial lines should determine the boundaries of a union. Following out this policy of having only workmen of like kind in an organization, it was until recently the common practice for those craftsmen considered masters of all the work of a trade to exclude from their organization all auxiliary workmen.

This practice of skilled workmen excluding from their organizations unskilled and semi-skilled co-workers has been defended chiefly on the ground that only in this way could the welfare of the trade be assured. Since the interests of those engaged in a single trade but at different grades of work are not always identical but are frequently conflicting, it has been contended that an organization made up of both journeymen and helpers would be subject to frequent dissensions, enabling the employers to play one class of workmen against another, to the detriment of the union. This argument is not without force. Internal dissensions might arise over the passage of union rules and regulations, or over collective bargaining with the employers. For instance, in determining what wages shall be demanded for union workmen, both journeymen and helpers, it is quite probable that there would be no consensus of opinion as to the difference which should exist between the wages of the mechanic and those of his helper. When an agreement is being made with employers, this difference of opinion as to the relative wages of the skilled and the unskilled classes might be a source of contention which would cause disruption of the union. The president

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of the Tile Layers realized the difficulties which face any union composed of both helpers and journeymen when he said: "By the acquisition of the helpers the international union faces the problem of legislating virtually for two trades under one jurisdiction."[1]

In some trades the policy of the skilled craftsmen of allowing as little work as possible to be done by auxiliary workmen and of opposing any advance on the part of such workmen may have had influence in determining the policy of craftsmen in excluding helpers from their organization. Obviously, it is inconsistent for journeymen to oppose both the employment and the promotion of helpers and at the same time to admit them to an organization which is supposed to seek impartially the welfare of all its members. The preamble to the constitution of the United Association of Journeymen Plumbers, Gas Fitters, Steam Fitters and Steam Fitters' Helpers asserts that "the aspirations of this Association are to construct an organization which shall subserve the interests of all its members." In view of this statement and of the fact that the plumbers' union has been so strenuously opposed to the employment and, where employed, to the promotion of helpers, it would be surprising if this same union should provide for the organization of the helpers in the trade.

Craft pride, together with the belief that recognition of the helpers as members would impair a vested right, was no doubt of considerable force in causing skilled artisans of many unions to refuse their less skilled associates admission into their organizations. Evidence of this can be found in the convention proceedings of almost any union in which there has been an attempt to provide for the organization of auxiliary workmen. For instance, when the Machinists were contemplating a change in their constitution so as to make handymen eligible for membership, there were many objections, some of which were wholly the result of craft pride. One delegate said: "If you are in favor of taking

[1] Proceedings, 1903, p. 17.

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in the handyman you must remember that the general feeling in our organization is opposed to being put on an equal basis with the handyman."[2] Another said: "We do not want to lose sight of the fact that we belong to the International Association of Machinists, not of handymen. If we take in these men we will have to change our name to the International Association of Machinists and Handymen."[3]

At this point it is important to note the policy of the American Federation of Labor with respect to the organization of the helper. Secretary Morrison, in answer to an inquiry as to the principles which guide the Federation in deciding whether helpers shall have a national organization independent of the journeymen's unions, replied: "It depends wholly on the judgment as to what relationship will be most advantageous to all concerned. As you are aware, the helper is closely related to the journeyman. One of the objects of the Federation is to bring the members of the various crafts and callings into the closest possible relationship for mutual co-operation. Before the system of specialization was developed to such a high degree as prevails in modern industry, the journeymen of the various trades were all-around mechanics, and there was a wide gulf between the labor of the journeymen and the labor of the helper. This placed them in distinct classes. The development of specialization has frittered the skill of a mechanic in the all-around sense; in other words, in the present system, a workman is trained in a certain branch of the trade and does not become skilled in all of its branches. This specialization requires a much shorter apprenticeship and the helper can be more readily fitted to take up the work and, hence, he is more nearly a competitor than was the case under the former conditions. This transition in the work has brought the journeymen and the helper into closer relationship and the action of the different national organi-

[2] Machinists' Monthly Journal, July, 1903, p. 588.
[3] Ibid., p. 587.

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zations in organizing their helpers under their jurisdiction is a result of this condition. An International organization in a trade is recognized by the A. F. of L. as having entire jurisdiction over that trade. The helper of a trade belongs to a trade, and consequently any claim of an International union to the helper in a trade over which it has jurisdiction must have a prior recognition."[4]

This lengthy quotation illustrates the striking contrast between the policy of most of the early national unions of artisans in refusing to organize in conjunction with helpers, and the policy of the American Federation of Labor in seeking to bring helpers and journeymen into a closer relationship and, if possible, into the same union. The significance of these two opposing policies will receive further attention. It is sufficient to say here that they have led to the two main modes of organizing helpers. One of these is to organize them independently of the journeymen, and the other is to organize them under the jurisdiction of the journeymen's union.

There are four classes of helpers' organizations which have no connection with the unions of skilled artisans: (1) local unions entirely independent of any other body; (2) national organizations independent of the American Federation of Labor; (3) local unions affiliated directly with the Federation of Labor; and (4) national organizations affiliated with the Federation of Labor.

(1) Before the rapid growth of the Knights of Labor in the late seventies and the organization of the American Federation of Labor in 1881, it was owing to the refusal of journeymen to receive helpers into their organizations that such auxiliary workmen, if organized at all, had no connection with the journeymen's unions. Little information concerning the organization of the helpers at this early period is extant, yet that which does exist shows that in certain trades they were actually organizing themselves independently of the mechanics' organizations. As early as

[4] In letter to the writer.

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1871 mention is found of a union of blacksmiths' helpers in Albany, New York. It appears that this union had been in existence for some time prior to the above date and was desirous of corresponding with other helpers, organized and unorganized, with a view to calling a national convention in order to organize a national association.[5] The plan seems never to have crystallized, and for the time being blacksmiths' helpers, where organized, remained in independent local unions.

Another group of helpers who early had local unions were the assistants of the iron boilers or puddlers. In 1871 the puddlers' helpers at New Albany, Indiana, thanked helpers for financial assistance to the amount of $149, given to them during a strike.[6] The fact that puddlers' helpers held meetings, called strikes, and paid benefits indicates the existence of some kind of local organization. Two years later, in 1873, the puddlers' helpers in Chicago went on strike against the wishes of the puddlers. From the report of the president of the United Sons of Vulcan it is evident that these helpers had an organization of their own.[7] Indeed, though the American Federation of Labor discourages the formation of such local lodges, helpers even at the present time often organize themselves into independent local unions.

Helpers organized under the jurisdiction of the Federation of Labor frequently secede and become independent organizations. The tendency of helpers, especially of unskilled helpers or laborers, to secede from the Federation or to form an independent organization seems much greater than is the case with skilled workmen. Secretary Morrison of the Federation attributes this to the foreign element among the helper class of workmen.[8] As a rule, the foreigners engaged in such work are of an emotional temperament, and yield readily to the persuasive powers of

[5] Machinists and Blacksmiths' Journal, July, 1871, p. 272.
[6] Vulcan Record, December 31, 1871, p. 18.
[7] Proceedings, 1873, p. 11.
[8] In letter to the writer.

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ambitious persons who seek to obtain positions of leadership by organizing unaffiliated unions or by having those secede which are affiliated. Many such local unions—for example, the Polish laborers in Toledo and the Polish and Italian laborers in Buffalo—are composed exclusively of foreigners.

In other cases, independent local organizations have come into existence because the helpers were not satisfied with the conditions under which they were to be transferred from the jurisdiction of the Federation of Labor to that of the journeymen's organizations. Thus in 1911, when the International Association of Machinists provided for the organization of helpers under their jurisdiction, the Federation of Labor transferred the local unions of Machinists' Helpers to the International Association of Machinists. The helpers, who had no hand in this transfer of jurisdiction and who were not on the whole pleased with the status they were to have under the Machinists, preferred in many instances to form independent local bodies rather than to become attached to the Machinists.[9]

It is claimed that low dues have had considerable influence in inclining helpers to independent rather than to affiliated unions. Auxiliary workmen, especially the remote helpers, are often a shifting class, and do not see that they are benefited by a strong treasury. Speaking of the independent local unions of hod-carriers and building laborers of New York, the president of the International Union of Hod Carriers and Building Laborers said that these workmen could be persuaded to come into the International Union but for the extremely low dues which they pay in the independent union.[10]

(2) Though the blacksmiths' helpers in 1871 and the puddlers' helpers in 1873 made efforts to form national organizations, their plans never materialized, and all

[9] Interview with the president of the International Association of Machinists.

[10] Official Journal [Hod Carriers and Building Laborers], April, 1907, p. 5.

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national organizations of helpers independent of the American Federation have come into existence since the formation of the Federation of Labor and represent the results of some dissatisfaction with the Federation. According to a writer in the official journal of the International Hod Carriers and Building Laborers' Union of America, "the first laborers' union organized in America as an international union was established in the State of Massachusetts some eighteen or twenty years ago."[11] Since that time a number of independent national unions of building laborers have been formed, prominent among which have been the International Laborers' Union, with headquarters at Dayton, Ohio, and the International Building Laborers' Protective Union of Lowell, Massachusetts.

Independent unions of laborers or helpers, whether local or national, as a rule have not prospered. Their weakness is traceable to several causes. In the first place, helpers are for the most part either boys or second-rate men, neither of whom possess executive ability sufficient to guide a union with any degree of success. Taking advantage of this lack of leaders among the laborers, demagogues having at heart their own welfare rather than that of the workmen gain control of the unions and exploit them at their will.[12]

In the second place, the ephemeral character of independent unions of auxiliary workmen is accentuated by the obstacles thrown in the way of permanent organization by the American Federation of Labor and the unions affiliated with it, which wage unceasing warfare against the organization and existence of such unions. Dr. N. R. Whitney, who has made a careful study of the contests between the affiliated and the independent organizations, says: "A great deal of time and attention has been expended during the past few years by the American Federation of Labor and the Building Trades Department in an effort to bring about

[11] September, 1906, p. 5.
[12] See, for instance, Official Journal of the International Hod Carriers and Building Laborers' Union of America, July, 1906, pp. 7–8.

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an effective national union among the hod carriers and building laborers. Many dual local unions existed in various parts of the country, some of which had never been part of the national union, while others had seceded from it. The Federation used its influence to force all of these local unions to affiliate with the Hod Carriers, and considerable progress has been made toward the accomplishment of this purpose."[18]

(3) Since the organization of the American Federation of Labor, local unions of helpers affiliated with this body have been numerous. The Federation has been especially active in organizing those workmen whose organization is not provided for by the national unions having jurisdiction over the trades in which such workmen are employed. Whenever there are indications that the helpers in a trade or in a group of allied trades in a certain locality can maintain a lodge, an organizer seeks to bring them together, under a charter granted by the Federation, either into a federal labor union or a helpers' union representing a particular trade. A local union thus chartered may subsequently be disposed of in any one of the following ways: It may be transferred to the jurisdiction of some existing national union; a number of such affiliated local unions may be combined into a national organization, chartered by the Federation; or it may remain directly affiliated with the Federation under the charter originally granted to it.

Whenever a national union of journeymen seeks to bring under its jurisdiction its helpers, who have been hitherto excluded, it is the policy of the American Federation of Labor to sever direct connection with any local union of such workmen. Thus the boiler makers' helpers in 1900 and the machinists' helpers in 1911 were transferred from the American Federation of Labor to the national unions of the above-mentioned trades.

The American Federation of Labor does not relinquish

[18] "Jurisdiction in American Building-Trades Unions," in Johns Hopkins Studies, ser. xxxii, no. 1, p. 76.

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its right to organize helpers under its own jurisdiction unless the national unions with which such local unions are affiliated have made provision for organizing the helpers of their respective trades as members of the international organizations. In 1903 when the International Association of Machinists was discussing the question of organizing the machinists' helpers into an affiliated association, Delegate Keegan said: "On the auxiliary question we have just had a little experience previous to coming to this convention. An organizer of the American Federation of Labor floated into the town, Altoona, where I come from. He organized a Federated Labor Lodge and took in what we call the handyman, and everything went well enough for six months or a year. Then our association said, 'These people belong to us,' and made protest to the International President to maintain our position. The president sent me down there and I found it was harder to get them into our organization after they had joined the American Federation of Labor than if they had never been in any. The handyman and even the machinists preferred to stay in the A. F. L. because they could get in for fifty cents, whereas they would have to pay us three dollars."[14]

Whether true or not, the idea prevailed among the machinists at that time that the American Federation of Labor would not yield its jurisdiction over helpers unless the Machinists took them in as members on an equal footing with the journeymen. For instance, Delegate Sullivan said: "You are talking about an auxiliary. You will then have the greatest fight on your hands you ever had. You will mix in with the American Federation of Labor. They have a right under their charter to all those handymen but if you will put them into your organization on an equal basis you will overcome this."[15]

If there is a clear line of cleavage between the work of a mechanic and his helper, with little probability of transition

[14] Proceedings, 1903, p. 589.
[15] Ibid., p. 588.

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from the work of one to that of the other, the Federation of Labor does not oppose the organization of helpers into a separate union. Extreme caution on the part of the Federation becomes necessary at this point in order to avoid jurisdictional disputes. There is continual strife between certain trades because of such disputes, and certainly contentions of this character between two unions whose members work hand to hand at all times would be much greater than between two unions with fairly well defined trade lines. For instance, if the blacksmiths' helpers in 1903 had been organized, as some suggested, into a national union, chartered by the Federation of Labor, it is highly probable that there would have been constant friction between the blacksmiths and the helpers. Every introduction of a new piece of machinery or of a new process would be the occasion for a redistribution of work between the two national bodies.

(4) Secretary Morrison of the American Federation of Labor states[16] that the Federation had never refused a charter to helpers desiring an international union of their own. But the fact that low-grade helpers, such as the building laborers and the foundry employees, have been organized into national unions while helpers of a far higher type, as the machinists', the blacksmiths', and the boiler makers' helpers, have not been organized into a national union, suggests that the Federation has not given the same encouragement to all helpers.

The two national unions which have been chartered by the Federation are the International Hod Carriers and Building Laborers' Union of America and the International Brotherhood of Foundry Employees. The important fact to be noted in connection with these organizations, especially the former, is that trade lines are not observed in their formation. Inasmuch as laborers change so rapidly from one trade to another, it is more satisfactory to group those in closely allied trades into one body. This

[16] In letter to the writer.

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arrangement avoids the frequent changes in membership which would be necessary were the laborers organized according to the trades, and it makes the union more stable. As Secretary Morrison says: "The helpers in the Building trades have organized close together because of their close relationship in the work and the advantage of this form of organization. If the laborers of the various crafts in the building industry were divided, you can readily realize that it would bring about the formation of several organizations instead of the present concrete organization that now exists among them."[17]

An important phase of the matter, whether deliberately planned by the Federation or not, is the fact that by thus organizing building laborers in a general labor union there is no danger of serious controversies with a building-trade union. Being a complex body of laborers from different trades, other matters than jurisdictional disputes engage their attention. Moreover, this form of organization gives a union jurisdiction over certain classes rather than over any specific part of a trade. The craft unions are thus left in undisputed possession of their respective trades. On the other hand, if the helpers in a trade, especially the more skilled ones, were given a national charter, there would, of necessity, be a division in jurisdiction between journeymen and helpers, with a likelihood of endless jurisdictional disputes.

The policy of the journeymen in certain trades in not taking helpers under their jurisdiction or into their organization, and the policy of the Federation in not organizing into separate national unions those helpers who tend to encroach directly upon the work of the mechanics, have prevented, in some instances for long periods, skilled helpers or semi-skilled mechanics from organizing a national association of their own. Thus the unskilled building laborers and the foundry employees enjoyed the privilege of national associations as early as 1904, while the helpers in the machine shops

[17] In letter to the writer.

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up until 1911 were forced, if organized in connection with the Federation, to content themselves with local organization.

The older unions formerly gave little attention to organizing helpers. In recent years, however, unions composed of skilled craftsmen have with one or two exceptions changed their policy and have made some provision for the organization of auxiliary workmen.

The forces instrumental in bringing about such a change may be summed up as follows: (1) a clearer recognition of the common interests of mechanics and their helpers; (2) inability of journeymen to control the helpers as long as the helpers are unorganized or organized independently of the journeymen's organizations; (3) an increasing division of labor. It can be readily seen that these forces do not act exclusively of one another. The common interests of the two classes growing out of a close association in work and an approaching equality in skill have made it difficult for the journeymen to control the situation because the helpers have become their competitors. Likewise, division of labor has been the great factor in breaking down the barrier of skill between journeymen and helpers and has thus developed an increasing community of interest between the two classes.

(1) The common interest of helpers and journeymen grows out of both an intimate, dependent association in work and like relation to a common employer. A potter who uses a jigger for making dishes employs three assistants—a batter-out, a mold runner, and a finisher. If a jiggerman lacks any or all of these assistants, his work is hampered. He must either perform all the duties connected with the work which falls within the jurisdiction of a jiggerman, or combine with other jiggermen who are likewise short of helpers. In the latter case skilled workmen, working at piece rates, are forced to do work which they had expected to have done by helpers, and consequently they receive helpers' wages for it. In the former case, the jiggermen not only labor under this disadvantage, but they also lose much time

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in changing from one occupation to another. In either event, earnings are greatly reduced. On the other hand, if the jiggermen are kept from work in any way, their helpers are left unemployed. Doubtless this mutual dependence in work has in many trades turned the balance in favor of united organization;[18] at least, union leaders who have favored the admission of helpers into journeymen's unions strongly emphasize this point. Thus, the president of the Amalgamated Association of Iron, Steel and Tin Workers has stated: "This being true, that is the less skilled workman must assist the more skillful workman to enable him to complete or finish the work at which both perform a proportionate amount of labor according to the skill required; therefore, I deem it advisable to admit all that are directly working at jobs necessary to keep a train of rolls running or a furnace working that furnishes iron for a train of rolls, otherwise, there may and can be trouble expected almost at any time if that class of labor is not made eligible to membership."[19]

The second element affecting the common interest of journeymen and their assistants is their relation to a common employer. Journeymen and helpers have the same hours of work, the same shop conditions, sanitary and otherwise, and a common employer upon whom demands must be made for any change in working rules or for an increase in wages. Responding to recent agitation, the slogan of many trade unionists has become solidarity, at least to the extent of combining all the workmen of a single trade into one body. Acting on the principle that in union there is strength, many artisans have put in the background their former policy of having skilled craftsmen only in their organization, and now advocate the admission of helpers. Secretary

[18] Although the pottery industry furnishes an excellent example of the common interests of journeymen and helpers growing out of an intimate relation in work, it should be noted that the helpers have not as a rule availed themselves of the privilege of joining the Brotherhood of Potters. This is due to the fact that they are employed and paid by the journeymen.

[19] Proceedings, 1887, p. 1953.

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Gilthorpe of the Boiler Makers declares: "As the example of organization throughout the world is to consolidate and solidify, I would strongly urge the admission of holders on and helpers into this brotherhood."[20]

(2) While skilled mechanics of broader views have argued in favor of the organization under a single charter of all workmen within a trade, the chief reason why most journeymen have come to favor the organization of journeymen and helpers in the same union is that experience has taught them that it is difficult if not impossible to control the shops if their helpers, especially the more skilled, are unorganized or are organized independently of their more skilled co-workers. The plan of leaving helpers to look out for themselves having failed to bring about desired results, the next move has been to organize them in some relation to the craftsmen of the respective trades. That self-regarding rather than benevolent motives have actuated the journeymen in this change of policy appears not only in the expressions of various union leaders on the subject and in the fact that helpers have not been admitted until after repeated attempts to control them in other ways have failed, but in the order in which the different classes of helpers have been admitted and in the restrictions upon the privileges of helpers when admitted.

One of the commonest arguments used in persuading artisans to admit helpers into their organizations is that such a plan will better enable the journeymen to control the helpers and thus eliminate the evils incident to their employment. A few examples will illustrate this point. The president of the Iron, Steel and Tin Workers said that, judging the future by the past, there was trouble in store for the association unless it should legislate so as to have complete control of all men working in and around mills.[21] In advocating extension of membership, the secretary of the Boiler Makers asserts: "When this brotherhood has within its fold all who

[20] Journal of the Brotherhood of Boiler Makers, August 1, 1900, p. 235.

[21] Proceedings, 1887, p. 1953.

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earn their living at the trade, won't we be better able to control all encroachments both numerically and financially by reason of our numbers and increased revenues?"[22] More radical than these expressions on the subject are the words of a delegate who argued as follows in favor of the taking of handymen under the jurisdiction of the machinists: "We are only trying to get the handy-man under our control, so we can put him out of existence."[23]

In considering the motives that have influenced journeymen in admitting helpers, it is significant that the unions making such a change have not done so until after vain efforts have been made in other ways to control the helpers. For instance, the Blacksmiths, the Boiler Makers, and the Machinists tried in every conceivable manner to check the encroachment of the helpers, both in work and in numbers, before reaching the conclusion that it is good policy to have the helpers connected with their respective organizations.

Further proof that the dominant motive influencing the artisan has been a desire to benefit himself rather than the helper is the fact that in those trades where there are different grades of helpers those who had been giving the journeymen most trouble were admitted first. The handymen or advanced helpers were taken in by the Machinists in 1903,[24] but not until 1911[25] were the helpers proper made eligible for membership, while the general helpers or laborers are still unorganized. Similarly, the Iron, Steel and Tin Workers admitted some of their more advanced helpers into the union in 1876,[26] but not till 1889 did this union open its doors to all men employed in and about iron and steel mills.[27] It is difficult to believe that the Marble Workers have interested themselves in organizing the helpers primarily for the benefit of the helper, because the Marble Workers persistently

[22] Journal of the Brotherhood of Boiler Makers, October, 1900, pp. 333–334.
[23] Machinists' Monthly Journal, July, 1903, p. 587.
[24] Ibid., pp. 586–588.
[25] Proceedings, 1911, p. 86; Constitution, 1912, p. 57.
[26] Proceedings, 1877, p. 50.
[27] Proceedings, 1889, p. 2686.

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refuse to allow their helpers any legal entrance to the position of a journeyman, and hence deny them admission to the journeymen's local unions.[28]

In a preceding chapter attention has been called to the fact that helpers make it difficult for the journeymen in a trade to control the shops of that trade because helpers act as strike breakers and increase the number of non-union shops. The belief that the helpers are especially liable to act thus contrary to the will and interest of the journeymen has led many artisans to favor the organization of journeymen and helpers in the same national union. The likelihood that helpers will act in opposition to journeymen when organized apart from them is well illustrated in a difficulty between the puddlers and their helpers in Chicago. When the iron puddlers organized as the United Sons of Vulcan, only those who were capable of taking charge of a furnace were eligible to membership. Trouble soon arose because the helpers would not, or at least did not, always go out on strike with the puddlers. The reason commonly ascribed for this failure to give support was that the helpers had no organization and no strike benefits.[29] At the convention of 1872 the president urged that helpers be admitted to the union in order to overcome this difficulty. But the committee on the good of the order, instead of reporting favorably upon this proposal, recommended that the helpers be assessed for strike benefits one half the amount assessed puddlers, and that in case of a strike the helpers receive a like proportion of strike benefits.[30] This plan was adopted, and appears to have worked successfully. In Chicago, however, when the helpers were called together and the above scheme was explained, they rejected the project of the puddlers and formed an association of their own. Later, when a new workman was put on in opposition to the wishes of this organized body of helpers, a strike was declared. The puddlers at great inconvenience to themselves contin-

[28] The Marble Worker, August, 1911, pp. 200–201.
[29] Vulcan Record, August, 1872, p. 23.
[30] Ibid., p. 48.

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ued to work. The helpers, thus deprived of employment, went to Knightsville, Indiana, and took the places of the boilers who were on strike at that time.[31]

Conflicts with helpers affiliated directly with the American Federation of Labor have doubtless had weight in inducing national unions of journeymen to favor the extension of jurisdiction to the helpers of their respective trades. This is clearly seen in the experience of the Blacksmiths. Many appeals and inquiries came to the Blacksmiths after the convention of 1901 in regard to organizing the helpers. The reply given was in the nature of a recommendation to organize the helpers and to send to the American Federation of Labor for a charter. Soon thirty or forty local unions of helpers were chartered by the Federation. Then trouble began. Demands on employers were made without the consent of the blacksmiths. Strikes were declared, and the blacksmiths were compelled to quit work or work with non-union helpers. Finally, it was decided to submit to a referendum vote the question of admitting helpers into the Blacksmiths' Union.[32]

(3) The recognition of the common interests of helpers and journeymen, and more especially the failure of journeymen to control helpers and the shops in which they work, have been the immediate causes of a change in the policy of unions of journeymen wtih respect to the organization of helpers. It is, however, essential to note that this common interest, as well as the inability of the journeymen to control the shops, has not remained constant during the transition from one policy to another. Changes in objective conditions, summed up in the phrases "division of labor" or "specialization in work," have operated. In other words, there has been an increase in the common interests of mechanics and helpers, and an increase in the difficulties in the control of the shops by the journeymen because of a more extended division of labor. Secretary Morrison of the Federation of Labor has said that this transition in work has

[31] Proceedings, 1873, pp. 11, 12.
[32] Proceedings, 1903, p. 14.

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brought journeymen and helpers into closer relations, and the action of the different national organizations in organizing the helpers under their jurisdiction is a result of this condition. This change of method in economic production has been a remote rather than an immediate cause of the journeymen's change of policy. A closer analysis of the change in economic production is necessary in order to understand just why and how such a change should effect a corresponding change in the theory and practice of organizing the workmen in a trade.

In the first place, the two great evils incident to the employment of helpers—trade disintegration and an overcrowded trade—are greatly intensified as the division of labor becomes more minute. Where specialization in work is the rule, the system in which an artisan learns all branches of a trade is sure to decay. Under such conditions, the helper, provided he be not handicapped by mental or physical disabilities, is practically certain to become an efficient workman at the operation at which he assists. The result is that soon a large part of the work of a shop is done by those workmen who have never served an apprenticeship in the full sense of the word. In short, specialization in trades and processes where helpers are employed has transferred the work of the trained, all-round mechanic to the specialist. With this increase in the number of helper-trained workmen and consequent decrease in the relative number of all-round mechanics, it is evident that the journeymen must lose some control formerly exercised over the shops. To regain this control, they must widen their union so as to include not only those who have become specialists by serving as helpers, but also the helpers themselves. A writer in the Blacksmiths' Journal, realizing the significance of these changes, wrote: "We have made tools, formers and machinery, and the boy and the helper are using them in ever increasing numbers, with a more than corresponding decrease in blacksmiths . . . the apprentice system seems to be becoming obsolete, many corporations preferring to

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advance helpers to run the forge and the furnaces. . . . Undoubtedly this method is come to stay and we must sooner or later acknowledge it and organize ourselves accordingly. In many parts of the country where our unions are established there are very few eligible members and it becomes somewhat burdensome to maintain a good working union and be strong enough to make any demand and expect to get it, and then should any trouble occur, the corporations can, would, and do get along for months, if necessary, with helpers, heaters and helper-smiths. This is the weak point in our armor where we could be easily defeated and our employers understand this."[88]

The effect of increasing division of labor and of the introduction of machinery upon the policy of journeymen with respect to the organization of the helper is illustrated by the extension of the boundaries of the International Association of Machinists to include within its jurisdiction all employees of a machine shop except unskilled helpers or laborers. Within the last two decades the nature of the work done and the skill required in a machine shop have undergone a great change. Whereas a few years ago machinists' work consisted of a few general processes—turning, fitting, and setting up—now with the introduction of specialized machinery and tools, machinists' work has come to consist of specialized jobs. With the introduction of these labor-saving devices it is no longer necessary that every man in a machine shop shall know how to use efficiently each tool or machine therein. Nor is it necessary for him to serve a long term of apprenticeship in order to operate a machine. The result has been that the regular apprentice-trained machinists have lost a large part of the work in the shops.

In 1903, in order to overcome this difficulty, the president of the International Association of Machinists advocated the admission of workmen other than journeymen into membership. He said: "The difficulty we are constantly confronted with is to decide in what consists machinists' work.

[88] June, 1901, p. 13.

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For instance, in some locomotive shops machinists do steam-pipe work and the building of engine works, while in others this work is performed exclusively by the 'handyman.' There should be drawn a definite line so that members of our organization should know their constitutional rights, and feel that they will be considered in the fulfilment of the same. In my opinion we can not completely solve this problem until we have taken entire control of the machine shop, when we will be in a position to make an agreement covering the employment of all who work therein."[34]

Though not going as far as advised by the president, the Machinists provided for the admission of specialized workmen into the union.[35] The jurisdiction of the Machinists as thus enlarged included twenty-five distinct classes of workmen. The handyman and helper questions continued to be the leading topics at conventions. Gradually other specialists such as machine tenders were made eligible for membership. Finally, in 1911 arrangements were made for the organization of helpers in local unions chartered by the International Association of Machinists.[36]

Up to this point the discussion of the organization of the helper has centered about those unions of artisans which in their early history refused to provide in any way for the organization of their helpers. Certain unions, however, have pursued a different policy. The Mine Workers, for example, from the first were organized on an industrial basis and claimed jurisdiction over all work about the mines. Certain unions organized after the barrier between journeymen and helpers had begun to disappear and after apprentice regulations had lost some of their sanctity made provision at the time of their formation for the organization of helpers in some definite relation to the journeymen. The Electrical Workers, the Elevator Constructors, and the Steam Fitters

[34] Quoted in Bulletin, U. S. Bureau of Labor, no. 67, November, 1906, p. 689.
[35] Machinists' Monthly Journal, July, 1903, pp. 586–589.
[36] Proceedings, 1911, p. 86; Constitution, 1912, p. 37.

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were organized on this basis, and have never expressed particular dissatisfaction with this policy.

When an organized body of mechanics has once decided that it will be advantageous to organize its helpers, the next important considerations are the general plan of organization and the status of the helper in his relation to the journeymen. Various plans, differing in detail, have been tried; but in the present discussion these may be distinguished as the plan of having helpers and journeymen in separate local unions, and the plan of having them in the same local unions.

Certain general arguments have been advanced in favor of each of these plans. It is claimed by those who favor the plan of having the journeymen and helpers in separate local unions that the presence of two or more distinct classes of workmen in a local union is not conducive to harmony between the different classes. Since there are many matters which concern a single class of workmen, it is argued that these matters can be more satisfactorily discussed when the journeymen and the helpers meet in separate local lodges. Again, the journeymen, especially those in the more skilled handicrafts, look with disfavor upon the admission of helpers into their local unions, because such a step seems to them to be a complete breaking down of all lines between the skilled and the unskilled workman.

On the other hand, it is claimed by those who favor the plan of having helpers and journeymen in the same local unions that as long as the workmen in a trade meet as distinct classes in separate local bodies there will exist a strong class spirit which will manifest itself in friction between the local unions, and that local misunderstandings will be carried into the national conventions where the two classes meet in a single body. It is further argued that many trivial grievances will arise as long as there are two classes of local organizations under the jurisdiction of a single national union, and that these imaginary wrongs will disappear and the classes come to appreciate each other more if thrown

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together frequently in local meetings. Another argument put forth by those who favor the single organization plan is that it does not result in conflicting demands upon employers. It is, of course, admitted that in a local union composed of journeymen and helpers, questions may arise concerning which these two classes have opposing views; but these questions are threshed out in the union meetings.

The experiences of the Boiler Makers afford opportunity for an estimate of the comparative merits of the two plans of organization. In 1900 the Boiler Makers made provision for taking helpers into the local unions of boiler makers,[37] but in 1901 it was decided to withdraw the helpers from the journeymen's lodges and to form helpers' lodges.[38] Finally, in 1912 arrangements were made to do away with helpers' lodges and to take helpers again into the journeymen's local unions.[39] President Gilthorpe of the Boiler Makers, when questioned as to the reasons for this last change, replied: "The reason that we have consolidated the helpers and the Boiler Makers is this: They are one trade with several branches, and we understood if they were all together we could control the trade better. Originally it was the same as today, all branches together. New men came into the convention and the first change was made, but it was never satisfactory at any time."[40]

The above arguments are in the main applicable to all organizations alike, and it is difficult to tell just why some unions have chosen one of the above plans and some the other. Undoubtedly, however, sentimental forces have been more important factors in some instances than in others in favor of separate local organizations for helpers. Journeymen who in times past opposed the employment or the promotion of helpers and who set much store upon the skill of their craft can more easily be brought to accept the helpers as members of their national unions than they can to

[37] Journal of the Brotherhood of Boiler Makers, August 1, 1900, p. 248.
[38] Constitution, 1901, art. iii, sec. 1.
[39] Subordinate Lodge Constitution, 1912, art. iii, sec. 3.
[40] In letter to the writer.

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accept them as members of the same subordinate lodge. In the first case, helpers and journeymen sit together as members of the same union at rare intervals, but in the latter case they must come together as brother members at each meeting of the local lodge. The journeymen of the more skilled handicrafts rebel at thus putting themselves on what they consider an equal social plane with the helpers. The plan of having helpers and mechanics in different local unions has accordingly tended to prevail in those trades where the mechanics for a long time opposed the organization of the helpers. As class pride has become less marked there has been a growing sentiment in favor of the abolition of separate local lodges for helpers. In the case of the Boiler Makers, as has been seen, this change in sentiment became great enough to bring about positive action in 1912. In other instances, unions which formerly absolutely prohibited helpers from gaining admission to local journeymen's unions have modified their policy so far as to admit helpers into the journeymen's lodges where conditions have not been favorable to maintaining a separate helpers' local union. For instance, in 1911 when an attempt was made to incorporate such a provision in the Machinists' constitution, there was such bitter opposition that the matter was dropped,[41] but in 1913 a referendum vote gave to helpers the privilege of conditional admission to the journeymen's lodges.[42] All unions now organizing the helpers into separate local lodges make similar provisions for organizing them with the journeymen if the conditions are unfavorable for a separate local union of helpers.

Organization of helpers and journeymen in a single body has not proved a cure for all the evils suffered by the organized journeymen in the employment of helpers. When the helpers are unorganized, friction over the work and the promotion of helpers is for the most part between the journeymen and the employers. When the helpers and the mechanics of a trade are organized within a single national

[41] Proceedings, 1911, pp. 146–147
[42] Constitution, 1913, art. i, p. 57

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union, questions growing out of the use of helpers become more distinctly internal problems. One of the purposes of union journeymen in organizing helpers in association with themselves has been to control the encroachments of the helper on the trade. Much friction has developed in this connection between journeymen and helpers when organized together. The sources of difficulty have been in the main (1) the subordination of the helper to the journeyman, (2) wage scales, (3) the working of journeymen with non-union helpers and of helpers with non-union journeymen, (4) jurisdictional disputes, and (5) promotion of helpers.

(1) The subordination of helpers often begins with the issuing of a charter. It is customary for the national unions to refuse to charter a local union of helpers unless the application therefor is first approved by the local union of journeymen. Thus in the constitution prepared for machinists' helpers it is stated that "where there are sufficient numbers of helpers employed to maintain a lodge, charters shall be issued subject to the approval of the local or district lodge having jurisdiction over that locality."[48] While this requirement is designed in part to prevent the organization of lodges under unfavorable conditions, it is also intended to prevent the organization of helpers where there is lack of harmony between helpers and journeymen and where such organization would obviously promote fraternal strife.

In most instances where a national union is made up of both journeymen's and helpers' local unions the journeymen insist that the helpers' lodges shall be subordinate in some way to their own. They feel that since the helpers are under the control of the journeymen while at work, they should likewise be under their control in the organization of which both constitute a part. They also feel that since the journeymen are superior to helpers in experience and position, the mechanics should be allowed the control in matters

[48] Constitution of Machinists' Helpers Organizations, art. ii, p. 57.

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of common concern to mechanics and helpers, at least in cases of last resort.

Subordination of helpers is brought about in various ways. In some cases control by the journeymen is absolute, and in other cases the helpers are restrained from independent action on important questions only. For instance, the Tile Layers in 1904 passed a resolution that tile layers' helpers should submit all demands to the tile layers' local unions in their respective cities.[44] The Machinists' constitution states that "no local of helpers shall be permitted to become involved in a strike without obtaining the sanction of the journeymen's local or district lodge under whose jurisdiction it is working and the Grand Lodge."[45] In still other cases subordination is brought about through the procedure defined for settling disputes between the two local unions. The Boiler Makers formerly provided that where a boiler makers' local division and a helpers' local division were unable to agree upon terms of employment or upon questions relating to their mutual interests, such matters should be referred to the international president, whose decision should be binding unless an appeal was taken to the executive council.[46] When cognizance is taken of the fact that the executive council at that time consisted of an international president and seven vice-presidents of whom only two were helpers,[47] it is readily seen that the journeymen had complete control over the helpers provided they saw fit to use the power which the constitution conferred upon them.

Whatever may be the specific way in which mechanics have kept or are keeping the helpers under their control, there is much friction over this policy of the journeymen, and the national conventions are usually called upon to consider the contention of the helpers for equal rights and privileges. The International Printing Pressmen and Assistants have a national board of directors which is com-

[44] Proceedings, 1904, p. 67.
[45] Constitution of Machinists' Helpers Organizations, art. v, sec. 2.
[46] Subordinate Lodge Constitution, 1908, art. xvi, sec. 17.
[47] Constitution, 1908, art. i, sec. 5; art. iv, sec. 2.

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posed of a president, three vice-presidents, and a secretary-treasurer.[48] Until 1900 only one of these offices was open to the assistant pressmen,[49] much to their dissatisfaction. In the convention of 1900 an amendment was offered which provided that two of the vice-presidents should be assistant pressmen.[50] After a heated controversy the amendment passed, the assistants unanimously voting for it, while a large majority of the pressmen opposed it even though they still retained a majority of the board.

(2) The formulation of the wage scale is another source of frequent internal trouble. Both helpers and journeymen overestimate their own relative skill. The helpers contend for less, the journeymen for more difference between the wages of the two classes. In 1906 trouble developed between the steam fitters and their helpers in Philadelphia over the wages to be received by the helpers. The helpers contended for thirty cents an hour, whereas the fitters claimed that the helpers had agreed to work for twenty-four cents an hour. To this the helpers replied that it was none of the business of the fitters what the helpers received for their work. The helpers struck in an effort to secure their demands for an increased wage, but the journeymen refused to support their demands and went to work with non-union helpers.[51] Friction of this kind is especially liable to occur if piece work prevails and if helpers are paid by the journeymen, who receive from the firm the entire wage for turning out the product.

(3) A third source of controversy between helpers and mechanics is found when one party or the other works with non-unionists. As a rule there is an understanding between helpers and journeymen who are members of the same organization that members of neither class will work with non-union workmen. The enforcement of this agreement depends largely upon a third factor, the employer. If the

[48] Constitution, 1913, art. i, sec. 1.
[49] Constitution, 1899, art. ii, sec. 1.
[50] Proceedings, 1900, p. 31.
[51] Proceedings, 1906, pp. 46, 67.

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union is strong in comparison with the employer, it may be carried out to the letter. If the union is too weak to cope with the employer, the agreement between helpers and journeymen is likely to be broken. In such event the group that suffers is likely to accuse the other of disloyalty. The extent of disputes of this kind is indicated in the action of the Steam Fitters. At the convention of 1897 a committee was appointed to draw up a resolution which would tend to create a more harmonious feeling between the fitters and the helpers. The chief recommendation of this committee was that the clause of the constitution with reference to fining fitters for working with non-union helpers and helpers for working with non-union journeymen be strictly enforced.[52]

(4) Jurisdictional disputes between helpers and journeymen are of two kinds, disputes over work and over workmen. There is continual complaint in most trades in which helpers are employed that the helpers are allowed to encroach upon the work of the journeymen. When journeymen and helpers are members of separate local unions but are under the same national jurisdiction, jurisdictional disputes of this kind are likely to occur. Especially is this true if the use of helpers is the result of the advantages of division of labor rather than of physical necessity. If there are two distinct classes of laborers in a trade, there must be some line of division in their work. This line wherever it may be drawn is more or less arbitrary, and consequently affords a fruitful source of contention between journeymen and helpers. In 1906 President Corder of the Marble Workers decided a dispute between Helpers' Local Union No. 6 and the Polishers and Bed Rubbers' Local Union No. 84. The helpers had entered a protest because the polishers were doing helpers' work.[53] The practice of one class of workmen doing work which, according to union regulations, belongs to another class of workmen is illustrated by the

[52] Proceedings, 1897, p. 31.
[53] Proceedings, 1906, p. 5.

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course of the marble workers in "doubling up" when helpers strike. This practice has been denounced as "both pernicious and perfidious."[54]

Sometimes jurisdictional disputes are over both the work and the workmen. The essential points in disputes of this nature are seen in the controversies between the assistants and the pressmen of the International Printing Pressmen and Assistants' Union. This union grants separate charters to local lodges of pressmen and of assistants.[55] When the web press began to supplant the flat bed press, it was obvious that to allow the unions of assistants jurisdiction over the assistants on the web presses would give them the control over the majority of the workmen in the web press rooms. The reason for this is that all the workmen on a web press except one or two are assistants in the sense that they work under others who have charge of the press. Consequently, the local unions of pressmen began to extend their jurisdiction over the assistants on the web presses. The assistants objected to this policy, and for years a large part of the time at the national conventions was taken up with this question. For instance, in 1899 the Franklin Association No. 23 entered a protest because the Adams Cylinder and Press Printers No. 51 assumed jurisdiction over the web press assistants.[56] They based their protests "on the grounds that the receipt of these assistants by a pressmen's union is unconstitutional, for they are, on the average, incompetent pressmen, and not receiving the pressmen's scale of wages, and that in cases where they are, as, for instance, in New York, the pressmen's organization have lowered their scale so as to steal them." They further claimed that "in every city where there is no web press assistants' organization, they are always affiliated with the assistants' union."[57] They deemed "the action of No. 51

[54] The Marble Worker, June, 1911, p. 123.
[55] Charters are now granted to various classes of workmen (Constitution, 1913, art. 1).
[56] Proceedings, 1899, pp. 45–119.
[57] Ibid., p. 46.

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in assuming jurisdiction over web press assistants a flagrant violation of not only the constitution, but of our rights."[58]

The pressmen justified the extension of their jurisdiction mainly by three arguments. In the first place, competency rather than the nature of the position held should determine a man's eligibility for membership in the pressmen's union. The so-called assistant pressmen were men who had had four or more years' experience in press-rooms and were competent pressmen, though they were working under another man who had charge of the press. Then, the attempt to distinguish assistants from pressmen on the basis of the position held at any given time would be impracticable. Inasmuch as a man may be in charge of a press one week and the next week hold a subordinate position, the plan of determining to what local union he should belong according to the kind of job he held would mean endless confusion because of the changing of members from the assistants' union to the pressmen's union and vice versa. The true doctrine should be, once a pressman always a pressman. Lastly, the pressmen's union should have jurisdiction over all workmen in a web press-room, otherwise there would be trouble because the different local lodges would have men working on the same presses.

In order to settle the dispute between the pressmen and the assistants on this point the following resolution was offered: "In accordance with the law as laid down by our International constitution and by-laws, the pressmen have only jurisdiction over pressmen; therefore, be it resolved, That that part of the constitution of No. 51 which applies to a scale for assistant pressmen be stricken out."[59] This resolution passed the convention,[60] but on reconsideration was lost,[61] and the convention closed without any definite action. Year after year the contest over the pressmen's assistants waxed warmer and warmer, completely over-

[58] Proceedings, 1899, p. 46.
[59] Ibid., p. 102.
[60] Ibid., p. 105.
[61] Ibid., pp. 114–118.

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shadowing all other questions, but remaining without final settlement.

At the convention in 1904 an amendment to the constitution was proposed by a delegate from Local Union No. 23 of New York to the effect that "fly boys" and carriers in newspaper offices should be members of the assistants' union.[62] In many localities these workmen were not organized at all, and the assistants urged their claims on the ground that all the workmen in a press-room should be organized, and that since the fly boys and carriers were not eligible for membership in the pressmen's union, it was the duty of the feeders and the assistants to organize them. The pressmen did not claim that the workmen concerning whom there was a dispute were capable of taking charge of a press; with this exception the grounds on which they opposed the resolution were exactly the same as those on which they had opposed the jurisdiction of the assistants' unions over the web press assistants. It was asserted that many pressmen had, on account of disability, been forced into low-grade work and that it would not be fair to force them back into the assistants' union. While the majority of the paper handlers were not eligible for membership in the pressmen's union, it was urged that such laborers ought to be under the jurisdiction of the pressmen with whom they worked rather than under the jurisdiction of a body composed for the most part of those who worked in an altogether different kind of press-room. This amendment was lost and the struggle continued.

At present the international constitution provides that "all members of Subordinate Unions employed on rotary webb presses, on book and magazine work, in the jurisdiction of local pressmen's unions as brakemen, tension men, oilers, assistants and so-called assistants shall identify themselves with the local assistants' unions in whose jurisdiction they are working;"[63] also, that "the Assistants' Union shall

[62] Proceedings, 1899, p. 19.
[63] Constitution and By-laws, sec. 39.

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have the right to organize all help working in web press-rooms for whom the Pressmen's Union have not provided a scale."[64]

(5) A question of even more concern than jurisdiction to the mechanics and helpers of a trade who are members of the same national body but in different local unions is the promotion of the helper to work known as mechanic's work and his transfer from the helpers' local union to that of the journeymen. As previously stated, it appears inconsistent for a national union pledged to the welfare of all its members to organize helpers and at the same time deny them promotion when the employers are willing to pay them mechanics' wages. In consequence, most unions have made some concessions when organizing helpers by granting them the privilege of having all or part of the journeymen's apprentices come from their ranks, or else have made the helpers apprentices in the sense that they recognize them as learners of the trade.

In a few instances, however, unions have organized the helpers without any provision for their future advancement either in work or in promotion to the journeymen's local unions. Thus in 1911, when the Machinists decided to organize the machinists' helpers under the jurisdiction of the International Association of Machinists, it was stated that "no helper can be advanced in the trade to the detriment of journeymen machinists or apprentices." One of the declared aims of the Machinists has been "to endeavor to secure the establishment of a legal apprenticeship of four years."[65] By an amendment to the Machinists' constitution of 1913 it was, however, provided that one half of all apprentices might be taken from the ranks of the helpers affiliated with the International Association of Machinists.[66]

[64] Constitution, 1913, By-laws, art. iii, sec. 3.

[65] Constitution, 1911, p. 3.

[66] This amendment reads as follows: "However a machinists helper, who has been a member of the International Association of Machinists' Helpers for two years in continuous good standing and has worked as a machinists' helper for two years in the shop where he desires to become an apprentice, and is not more than

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At the present time, all of the unions, except the Marble Workers, which have made provision for the organization of helpers have some arrangement whereby there is at least a possibility that an efficient helper may become a journeyman. In most cases this possibility is so remote that the helpers are continually trying to have the national unions adopt a more liberal policy. Indeed, when helpers are formed into local unions of their own, with opportunities to develop qualities of leadership and aggressiveness, they are likely to formulate schemes for removing those constitutional restrictions upon promotion.

The struggle of helpers to remove all restrictions on their advancement is also illustrated in the history of the International Printing Pressmen and Assistants' Union. Up until 1903 the constitution of the Pressmen and Assistants provided that "no subordinate Pressmen's union shall admit to full membership any person who has not served an apprenticeship of at least four years in a press room. Rigid examination as to the competency of applicants shall be made by a committee of the local union."[67] The international constitution also provided that apprentices were "to be taken from Assistants' Unions working under the jurisdiction of the International Printing Pressmen and Assistants' Union,"[68] but as one apprentice only was to be allowed for every four journeymen, the prospects for assistants to become pressmen were not encouraging to the members of the assistants and feeders' local unions. In 1899, therefore, the Assistants pleaded for the following addition to the above clause: "Said four years in a press room as a feeder to be considered as ample time to cover apprentice laws entitling him to full membership in press-

twenty-five (25) years of age, may become a machinists' apprentice and shall serve three years as such, and be governed by the same laws and rules as govern apprentices, provided the number of apprentices taken from machinist helpers does not exceed at any time the number of regularly indentured apprentices" (Constitution, 1913, p. 57, art. i).

[67] Constitution, 1898–1903, art. xxi, sec. 4.

[68] Constitution, 1898, art. xxii, sec. 1.

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men's unions when he receives the full scale of wages; he to have, at the time of admission, a paid up card of membership in the feeders and helpers' union."[69] The committee on laws reported unfavorably on the amendment, and their report was sustained.[70] This was doubtless due to the fact that the pressmen in the convention outnumbered the feeders and helpers or assistants.

It was contended by the feeders and the assistants as well as by those journeymen who favored the amendment that any member of the international union should be allowed to hold any position for which he was competent, and that when he was promoted to a pressman's position and received pressmen's wages he should be allowed membership in the pressmen's local union in his locality. Such restriction as existed was declared to be in favor of the non-union assistant or feeder, because when a man who belonged to no union secured a job as a pressman he was at once admitted to the union. It was also argued that such distinctions were purely artificial. A delegate asserted: "There is not a man in this association can define for me that line of demarcation between the gradations which exist between a feeder, an apprentice and a pressman."[71] On the other hand, the pressmen opposed the amendment on the ground that a restriction upon the promotion of the helpers was necessary for the protection of the men who had served their four years' apprenticeship.

In 1903 the constitution was changed so as to permit local pressmen's unions to regulate the number of apprentices. However, the struggle has continued, and it has been by no means a local issue. The attempts of the assistants to have the national union legislate in their behalf have not ceased, and appeals to the international union or to the international board of directors have been numerous. The gist of these local controversies and appeals can be understood from the following quotation from the president's report in 1903:—

[69] Proceedings, 1899, p. 69.
[70] Ibid.
[71] Ibid., p. 71.

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"Some of the appeals and the decisions thereon will come before this convention. Chief among them is one from Denver Pressmen's Union No. 40, appealing from my and the former Board of Directors' decision that a member of an assistants' union who has worked four years in a press room and is given the position of 'Journeyman Pressman,' is entitled to hold such position, even if the Pressmen's Union decide otherwise, or refuse to admit him to membership in the Pressmen's Union, under whose jurisdiction he may be working. This appeal as I am informed by No. 40, is not brought with any spirit of narrowness on its part, they only desiring to have the Convention decide 'whether it is wise policy' on the part of the International to allow members of assistants' union this privilege, even though such assistant does receive the scale of wages as supported by the Pressmen's Union in whose jurisdiction he may be working, and his competency vouched for by the Pressman foreman of the place where such assistant may be working, as a 'journeyman pressman.' No. 40 further contends that if such methods are allowed by the International it will not be conducive to the best interests of the Pressmen's craft in producing skilled and competent 'journeyman pressman' in line of succession. To which the board in its reply sustaining its actions points out the right of all members of the I. P. P. and A. U. under article XXVII, Sec. 2 of its International laws.[72]

"The above contention has been the cause of several of a like nature during the past year and have been decided by myself in like manner as in the case of No. 40, many of the Pressmen's Unions contending also that so long as they have members out of work, no assistant should be allowed the

[72] This law reads as follows: "A member of any Subordinate Union may work at any branch of the business; provided he shall transfer his membership and receive the consent from his union and from the union in whose jurisdiction he desires to work, and that he receives the scale of wages of said union. Should either disagree as to the competency of said applicant, he shall be allowed to work at the branch of business chosen by him pending a decision of the Board of Directors."

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right of advancement. That spirit of contention on the part of some Pressmen's Unions is too narrow for the I. P. P. and A. U. to entertain, but I agree with No. 40 that it is the duty of this Convention to decide in positive terms as to where the assistants' rights begin and 'where they end.'"[73]

Two important points are to be noted in this quotation: that the decision of the board and the president was anomalous in that it allowed a workman under the jurisdiction of one branch of a union to do work under the jurisdiction of another branch, and that the president and the board of directors, of which the majority were Pressmen, favored a broad liberal policy toward the helper. It is a significant fact that in practically all unions where helpers and journeymen are organized into a single national union, the officers, whether from selfish or benevolent motives, have advocated broader policies toward the assistants than have the majority of the members of the national unions. In many instances the national leaders have championed measures designed to increase the privileges of the helpers long before the unions were brought to accept them.

In the national organizations which provide that journeymen and their helpers shall be members of the same local lodges the subordination of helpers is brought about in a different manner than in unions which have distinct local lodges for helpers and journeymen. A common rule designed to keep the helpers under the control of the journeymen is to limit the number of helpers allowed in a lodge. Thus the International Association of Elevator Constructors provides that the number of helpers shall never exceed the number of mechanics.[74] In some unions where this policy is not included in the national laws the local lodges put limitations upon the number of helpers in a lodge. For example, it is a regulation of the local union of Electrical Workers in Baltimore that "the number of helpers admitted

[73] Proceedings, 1903, p. 369.
[74] Constitution and By-laws, 1910, p. 20.

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shall not exceed one to each wireman in good standing in local No. 28."[75]

It is likewise the policy of many unions to see to it that the number of helper delegates to national conventions shall never exceed the number of journeyman delegates. The Elevator Constructors provide that "locals entitled to more than one delegate may send a helper as one."[76] When this is connected with the rule that the number of helpers in the local shall never exceed the number of mechanics, it is evident that the helpers have no chance of getting control of the national convention. The jealousy with which journeymen guard their power in the national convention is illustrated by the rejection of an amendment to the constitution of the Tile Layers' Union offered in 1903, that "where local is composed of layers and helpers together sending more than one delegate to the convention, one delegate shall be a helper."[77]

In unions which have helpers and journeymen in the same local lodges, wage-scale disagreements, dissatisfaction with members and non-union members working together, jurisdictional disputes, and contentions concerning the promotion of the helper are similar in character but less tense in degree than in unions where the helpers and the journeymen are in separate local lodges. The explanation is simple. Where helpers assemble in meetings under the domination of the mechanics, they do not have the opportunities for launching movements designed for their betterment that they do when they meet in associations of their own. While the helpers may express dissatisfaction with various policies of the local of which they are a part, they do not usually succeed in crystallizing this dissatisfaction so as to bring about any unified action on their part. In fact, if the helpers so organized have grievances, about the only way they have of remedying them is by open rebellion, the suc-

[75] Constitution [no date], sec. 57.
[76] Constitution and By-laws, 1910, art. ii, sec. 4.
[77] Proceedings, 1903, p. 43.

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cess of which depends largely upon their strength and importance in a trade as compared with the mechanics. Not being a distinct unit of the national organization, they have no effective way to bring local disputes before the general convention for settlement. All contentions between helpers and journeymen are thus local both in character and in the manner of their adjustment.

In a few unions like the Elevator Constructors and the Electrical Workers, which recognize the helpers as learners of their trades and which have no apprentice system between the helper and journeymanship, the difficulties of the combined organization are much less than in trades which attempt to enforce apprentice regulations by requiring the helper, if he is ever legally to become a mechanic, to pass through the intermediary state or apprenticeship period. Some unions like the Mine Workers, which are industrial in their form of organization, put helpers and journeymen on practically an equal basis and have no apprenticeship regulations. In such cases, helper problems are not present at all or exist in a very modified form.

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CHAPTER IV

The Helper and Trade-Union Policy

In previous chapters, union policies concerning the helper have been set forth. We turn now to an estimate of these policies from the standpoint of economic welfare and social justice. These policies will be considered in the order pursued in the preceding chapters: (1) policies pertaining to the use of the helper; (2) policies concerning the hiring and compensation of the helper in piece-work trades; and (3) policies having to do with the organization of the helper. Of the policies of those unions which do not oppose the employment and the promotion of helpers nothing need be said. Such policies are negative rather than positive in character, and there are no points at issue between the employers and the unions as to the number and the advancement of helpers.

(1) One of the chief objections to the policy of outright restriction in the promotion of helpers is its unfairness to the helpers. Certainly it is not in keeping with democratic ideals of social justice to bar unconditionally the path of promotion against any workman. The policy of absolute restriction is open to further criticism because its enforcement undoubtedly means a decrease in the industrial efficiency of the men employed. This decrease might be brought about by destroying the stimulus to the helper which comes from the hope of promotion and thus preventing him from attaining his maximum efficiency; by removing from the journeymen the stimulating effects of competition; by preventing an efficient helper from taking the place of an inefficient journeyman or by forcing an employer to go outside of his own shop for workmen rather than promote those who are acquainted with the work of that particular shop;

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and by preventing the expansion of the trade to meet legitimate social needs.

Helpers who are cut off from the hope of being elevated to the rank and work of journeymen will naturally become more dilatory in the performance of their duties. It might even be asserted that the mechanics of a trade, by being relieved of competition from their subordinate workmen, will not put forth their best efforts to become more proficient in their craft. If a helper becomes or could become a more competent worker than the more inefficient workmen in a trade, the combined efficiency of the two workmen could be increased by an exchange of their positions. It is a well-recognized principle in the industrial world that the maximum efficiency of any group of workmen in a trade or industry can best be secured if they are assigned work according to their fitness for particular tasks. This exchange of positions, it is true, would not be to the interest of those inferior workmen who are in a union and who maintain their positions because the union gives them protection. But it certainly would be better for the union as a body because in this way the most capable workmen would be kept to the front and the standard of union efficiency raised. In this connection it is important to note that the present system of specialization and diversity in the work of the different shops in the same trade often renders a helper more capable of taking a journeyman's position in the shop where he has been working than is a journeyman who has never worked in that particular shop or at that particular process.

In case of the expansion of a trade and a consequent demand for more workmen the promotion of efficient helpers will increase their productive capacity, for a skilled workman owes in a large measure his productive superiority over an unskilled workman to the fact that he is allowed to confine himself to work which requires dexterity. In short, a skilled man, in order to produce the greatest amount, must be permitted to do skilled work. The positions made vacant by the promotion of helpers competent to do journeymen's

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work can be filled from the lower ranks of workmen, of whom there is always a plentiful supply. Thus the promotion of helpers to meet the demands of a trade is likely not only to increase the welfare of the helpers and to make them more productive, but it also serves as a means to relieve the congestion which usually prevails in the ranks of the less skilled workmen.

Since trade unions are usually conceded to be socially desirable, it may be contended that devices for strengthening trade unions are likewise desirable even though certain disadvantages are connected with such devices. This inference depends upon the success attained in bringing about the ends for which the device is designed. The restrictive policy of unions with respect to the promotion of helpers can hardly be defended on this score, for it has proved far from successful as a means of strengthening unionism.

In the first place, if a union opposes the promotion of helpers and closes its doors on them, they will, when opportunity offers, accept positions as non-union mechanics and in this capacity be infinitely more dangerous to organized labor than if promoted with the consent of the unions representing the trade or trades to which they belong. Even if a trade is overcrowded, it is evidently better for the union to be in control of all the workmen of the craft. In the second place, such a policy embitters the helpers against the unions and makes them eager to grasp any opportunity that gives them the upper hand of those who oppose their progress. As long as journeymen pursue such undemocratic policies they must expect that their helpers will act as strike breakers whenever opportunity presents itself.

Aside from the detriment to a union from such a policy, an opposite policy may yield positive benefits. If employers are allowed freedom in the selection of their own men, there would be a greater disinclination on the part of employers to allow a strike. If the employers have at work those whom they consider the best obtainable men for the positions of journeymen, they will not wish to run the chance of losing

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them. On the other hand, if inferior workmen maintain their positions by reason of a labor monopoly while skilled helpers are forced to remain in inferior positions, employers can afford to oppose the demands of the unions, since they may count on helpers to take the places of striking journeymen.

Much has been said by union writers in opposition to the promotion of helpers on the ground that such a course tends to lower the standard of a trade. That this is merely an assigned rather than the real reason for pursuing an absolutely restrictive policy with respect to the promotion of helpers is evident, for the maintenance of the standard rate is a sufficient guarantee that inefficient helpers will not be employed as journeymen.

What we have termed a modified restrictive policy of promotion, that is, allowing a certain number of helpers to be promoted according to certain well-defined or sometimes indefinite rules, differs in degree only from the absolute restrictive policy. To the extent that helpers are prevented by artificial means from becoming mechanics, to that extent the selection of the most capable workmen is hampered; an incentive to efficiency is taken from helpers and journeymen; a hostile spirit on the part of the helpers toward the journeymen is developed, and a weakening of the bargaining power of the union is effected.

A fundamental weakness affecting all trade-union restrictions on the promotion of helpers is that they are formulated to bar the advancement of helpers rather than to test the efficiency of candidates desiring recognition as journeymen. It would seem that the only just position for any union to maintain as to the promotion of helpers is to allow such promotion freely provided employers see fit to pay the standard rate of wages for the work done.

That limitations on the promotion of helpers are not necessary for union strength and stability, and that promotion on the simple basis of merit is feasible, is abundantly confirmed by the experience of certain unions. The firemen

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and brakemen are helpers, in fact if not in name, of the railway engineers and conductors respectively. The promotion of these helpers is, however, left to the employers. As a result there is no friction over the question of limitation of numbers. The Engineers and Conductors welcome into their respective organizations all who are able to do the work and receive the standard rate of pay. In other industries such as mining and the textile industries this plan is also followed. Investigations in England into industries in which journeymen are recruited from the most capable assistants without any restrictions by the union—except that the one promoted shall receive the standard wage of the position to which he has been advanced—further justify the claim that promotion of helpers on the basis of wage paid will not destroy the strength of the union. In cotton spinning the operators are recruited from the piecers, two of whom work under each spinner. Any piecer is free to become a spinner provided his employers will consent to entrust him with a pair of mules, and provided further that the piecer thus advanced to a spinner shall receive the standard wage for what he does. Notwithstanding this system of a perfectly open field for the piecers, Sidney and Beatrice Webb tell us that "the Amalgamated Association of Operative Cotton-spinners is . . . one of the strongest, most efficient, and most successful of Trade Unions. In good years and bad alike it has for a whole generation maintained the net earnings of its members at the relatively high level of from 35s. to 50s. a week."[1]

If, now, we turn from the question of promotion to the policy limiting the number of helpers or completely eliminating them, the important question is raised as to the desirability of having a journeyman or journeymen perform all the work without the aid of helpers. President Burke of the Plumbers said that the elimination of helpers in his trade was advisable even from the standpoint of the master plumbers, and that the only way for the Plumbers to settle

[1] Industrial Democracy, p. 474.

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this question satisfactorily would be for them to convince the masters that it is poor economy to employ helpers at all.[2]

The great advantage claimed for the helper system is that it provides for a more economical utilization of workmen by making possible their classification according to skill and capacity. If all the work of a trade which can be divided into skilled and unskilled parts be performed by expert craftsmen, the product turned out by each will not be the maximum amount because all of the time of the skilled workman is not given to the high-grade work which he is capable of performing. If helpers are not employed, then these semi-skilled mechanics—for such are most helpers—will be forced into lower-grade work, and the product of their labor will not be so great as it would be were they allowed to do the highest grade work of which they are capable.

It might be said that the foregoing argument is convincing only if there is a scarcity of skilled mechanics, or at least no excess of them, above the number needed for performing the highly skilled parts of a trade. If this were not the case, would not semi-skilled men have work while the skilled men were idle, and would not this result in a social loss? A careful study of this question shows that a helper system of work is not likely to result in the displacement of skilled men by unskilled men. Assuming that a standard or a minimum wage is maintained for helpers just as for the journeymen of a trade, what will take place if for any reason there is an oversupply of journeymen? The answer is obvious. Since even expert mechanics are not all possessed of the same degree of skill, those who prove themselves in the eyes of the employers the most capable will be selected for the high-grade work, and the others will be left for second-grade or helpers' work. Here again, as in the case of the most skilled work, if there is an excess of workmen the most efficient will secure employment, and the residuum will be pressed further down the line until finally

[2] Interview with the writer.

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the least desirable men will be forced out of the trade. That the employer will profit by engaging skilled men to do his work when the wage scale is the same per unit of efficiency for all classes is evident.

It is said that in the long run a helper system will tend to lower productive efficiency by reason of the fact that in serving as helpers, boys are often cut off from opportunities of learning a trade, and do not produce as much as they might had they never worked as helpers. It is asserted that helper positions are but blind-alley employments which in the end greatly increase the number of unskilled relative to the number of skilled workmen. The validity of this reasoning depends largely upon the efficiency of the helper system of work as a mode of learning a trade. If, as in the case of the blowing of glass bottles, much small help is employed and little opportunity is afforded them to learn the trade in which they act as assistants, there is no doubt that the boys thus employed are diverted from securing the preparation necessary to attain their possible maximum efficiency as workmen. However, these form exactly the class of helpers who have received slight attention from labor organizations, or none at all. Unions have as a rule concerned themselves only with helpers who have shown a tendency to learn a trade.

Here the helper system is criticised on the ground that it draws more men into a trade than are necessary for recruiting the trade, and hence produces one or both of the following conditions: a trade overcrowded with mechanics, or one filled with helpers or semi-skilled workmen who have little opportunity for advancement. Certainly it is clear that if the number of helpers in a trade is large—if, for example, each journeyman has a helper—and if all the helpers in the course of three or four years become expert mechanics, there would be under ordinary conditions an excess of mechanics over the number needed. In fact, however, in those trades where the helper system of entrance to a trade or position is not restricted by union rules, there is no tendency to over-

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crowd a trade. In the iron and steel business, for instance, helpers are promoted gradually as vacancies occur. Promotion is in regular order, but there is no clearly defined rule as to this; yet no complaint is made by the workmen that the system tends to produce too many journeymen. What really takes place is this: If men who are at the heads of teams become for any reason incapable of filling their positions satisfactorily, there is a reclassification of workmen. Helpers and journeymen exchange places. This is better for the journeymen than to be thrown out of work. As far as the helpers are concerned, there is usually room at the top, and few are kept at unskilled positions when they prove themselves worthy of promotion.

The question is not whether two skilled men can do more than two unskilled men, but whether it is desirable, taking the best men obtainable, to have a division in their work so that some become assistants to others. In spite of the protests of the unions that the use of helpers is poor economy on the part of employers, the fact remains that the helper system is a result of the division of labor which is usually recognized as superior to the system of having one workman do all grades of work in a trade. The fact also remains that the unions have not convinced employers that it is to the advantage of an employer to eliminate helpers. If wages per efficiency unit are the same for helpers and journeymen, and employers prefer to use a certain number of helpers, the evidence is fairly conclusive that the use of helpers affords economy in production.

This consideration brings up another question with regard to the advisability of doing away with helpers. The efficiency of the system as a means of learning a trade should have much weight in any judgment on this question. The helper system has certain advantages over any other system of learning a trade. In the first place, it is favorable to the efficiency of production because of the elasticity in the supply of the product which it renders possible. This elasticity is due to the fact that more easily and more quickly

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than any other plan of trade entrance the helper system permits an increase in the number of mechanics to meet the demands for labor resulting from the expansion of a shop or of a trade. By promoting a helper to a journeyman's position and by filling the vacancy thus made from unskilled or relatively unskilled workmen—of whom there is always a plentiful supply—an employer can keep his plant going, in case he loses some of his journeymen, without any great diminution of output. On the other hand, if there are no helpers in a trade and if there is in a shop a demand for mechanics above that which can be supplied from the regular apprentices, the employer will face one of two situations. Either he will not be able to supply his need, in which case his output will be greatly reduced, or he will be forced to select his mechanics from the unemployed, who are usually the less desirable men in a trade.

In the second place, since helpers are employed primarily to meet an economic need, the education they get comes as a by-product of an existing economic system. Hence the helper system affords an economical way of learning a trade. In blacksmithing, for instance, it is inconvenient and costly to provide a fire for an apprentice, who often does little more than waste material. Since it is essential that two men work together in blacksmithing, and since it is unnecessary that both these men shall be highly skilled, a helper by working hand to hand with a smith has every opportunity to learn the craft. Thus without any waste of material or time, helpers may become skilled in the trade.

If helpers be eliminated, how shall work be done which cannot be done by one man? This is a matter of importance in some trades. In plumbing, for instance, some of a helper's time is taken up in assisting the journeyman to lift and adjust heavy fixtures, work which one man cannot do by himself. Some plumbers contend that mechanics may assist each other at such work, and work independently of each other on all other work. It would obviously be poor economy to send out two high-priced mechanics to do a piece of work which one mechanic and a helper could do as well.

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Undoubtedly many unsatisfactory conditions the blame for which is given to the helper system are due not to the system itself, but to the methods employed by the unions to regulate or to abolish it. Of all the trades in which the helper question has been prominent the plumbing trade has been said to show the most unsatisfactory conditions. However, Sidney and Beatrice Webb report that in England the helper system is accepted by the unions of plumbers. They say: "The employers in London do not engage boys or apprentices to assist the men in plumbing, or to learn the trade. The custom is for each plumber to be attended by an adult laborer, known as the 'plumber's mate.' Any employer is at liberty to promote a plumber's mate to be a plumber whenever he chooses, provided only that he pays him the plumber's Standard Rate. Notwithstanding the fact that the number of 'plumbers' mates,' who form the class of learners, is four or five times as numerous as would suffice to recruit the trade, the London branches of the United Operative Plumbers' Society effectively maintain a high Standard Rate."[8] Reference has been previously made to the fact that the helper system of learning the plumbing trade has been accepted by the New York plumbers. In reply to an inquiry as to the workings of the system in that city, Secretary Hopkins of Local Union Number 489 writes: "The question of the helper has never received serious consideration as we feel that with the co-operation of the Master Plumbers (with whom we are on close terms) we can control them."

(2) We have seen that three methods of employing and paying helpers have been followed: (a) The journeymen engage and pay their helpers; (b) the journeymen engage the helpers, who are paid by the employer; and (c) the employers hire and pay the helpers.

(a) The policy of the unions in permitting if not in advocating the employment and the payment of helpers by the journeymen is not conducive to the organization of help-

[8] P. 475.

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ers in unions with the journeymen. The journeymen potters, for instance, do not object to taking helpers into their union, but the various classes of helpers in the pottery industry have not availed themselves of the privileges granted to them in this respect. The helpers do not care to be organized in the same unions with their employers.

In trades or industries where the journeymen hire and pay helpers the journeymen are frequently not consistent in their attitude toward collective bargaining. For instance, the Potters in agreement with the firms establish a wage scale. As employees the journeymen potters certainly think it fair and just that they, collectively, shall have a voice in fixing wages. However, as employers, the journeymen attempt to fix the wages of helpers. In the days of the United Sons of Vulcan, when the helpers were paid directly by the journeymen, it was the policy of the union, in which helpers were not then included, to establish a uniform rate of pay for helpers.[4]

(b) The present rule of the Iron, Steel and Tin Workers is that journeymen shall employ their own help, despite the fact that it is the policy of the union to have all helpers paid from the office of the firms.[5] At first thought this policy may seem unfair to the employers; but when consideration is given to the fact that in iron, steel and tin mills work is usually paid for by the piece or by the turn and that the piece wage includes the wages of both journeymen and helpers, it is readily seen that this method of hiring and paying helpers should ordinarily be satisfactory to the firms. In the first place, so much is paid for the work turned out, and it is immaterial to the firms whether the entire amount be paid to the heads of the various teams or to the individual workmen. In the second place, since journeymen must have help to do their work, and since their product and consequently their wages depend upon the efficiency of the help employed, the hiring of the help by the individual jour-

[4] Proceedings, 1875, p. 58.
[5] Constitution, 1912, art. xvii, sec. 21.

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neymen shifts responsibility from the firms to the heads of the various teams.

(c) The policy of unions of allowing the firms to employ and pay all helpers would appear at first thought to be the fairest plan of all to those directly concerned. Since, however, the output of a journeyman is largely dependent upon the work of his helper or helpers, this method at times may be a source of friction between a journeyman and his employer. Reference was made at the eighth annual convention of the National Association of Iron, Steel and Tin Workers to trouble in the Tubal Cain Lodge growing out of the furnishing of unsatisfactory help by an employer.[6] The product turned out was not up to the standard, and the boiler maker blamed the helper for the defective work. Obviously, if a boiler maker hires his own help, there is no shifting of the responsibility for unsatisfactory work. The boilermaker becomes responsible for the work of both himself and his helper.

In industries, however, where it is possible to separate the work of the mechanics and the helpers so that each will have definite duties, hiring and payment by the employer become possible, because it is not necessary that the piece prices shall include all the work of turning out the finished product. The jiggerman in the pottery trade could get a piece wage for the work done by himself just as well as he could for the work of himself and all his helpers. Even in cases of this kind, however, it is usually more satisfactory for journeymen to engage their own helpers, for they can act as overseers of helpers and at the same time do their own work effectively.

(3) From the standpoint of social interest the policy of excluding helpers from union membership can be briefly estimated. It is generally admitted to be socially beneficial for laborers of all classes to be organized. This being true, the question arises as to what should be the relation of organized helpers to organized journeymen in order to

[6] Proceedings, 1883, p. 1170.

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secure the most stable and efficient form of organization for all concerned.

With two exceptions, organizations of helpers not affiliated with journeymen's organizations or with the American Federation of Labor have not flourished. In the main this is due to the lack of initiative and executive ability on the part of helpers. The exceptions are the Brotherhood of Locomotive Firemen and the Brotherhood of Stationary Firemen. The members of these unions are of a higher type than most helpers, and for this reason they have been able of their own accord to maintain prosperous organizations. As stated in a previous chapter, no national organization of helpers representing only a single trade as distinguished from an industry has ever been chartered by the American Federation of Labor. The Federation has evidently acted wisely in not encouraging such organizations, for their existence would mean endless jurisdictional disputes with the journeymen's unions. It appears, therefore, that if helpers specialized in a particular trade are ever to be successfully organized they must be allowed to organize in conjunction with the journeymen of their respective trades.

It has not been possible to estimate with exactness the success which organized journeymen have met with in their efforts to organize the helpers in their trades, but from the information at hand it is safe to state that helpers as a rule do not seem to be attracted by the privilege of membership in journeymen's unions. Helpers about potteries and iron, steel and tin plants, according to information obtained from the secretaries of the unions in these industries, are not as a rule members of the union. This is no doubt due in large measure to the fact that journeymen are the employers of the helpers. Secretary Hogan of the Marble Workers writes as follows: "We have had an average membership of helpers of about thirty per year in the past ten years. One year, 1910, we took in about one hundred and fifty in the different locals. The helper in our industry is not

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favored with steady work the year around, therefore, there is very little inducement for him to join our organization, in many cases preferring to work on a privilege without making application to the organization."[7] The disinclination of marble workers' helpers to join the International Association of Marble Workers is doubtless due in part to the fact that the association is opposed to the promotion of helpers. The helpers feel that they have a better chance for promotion out of the union than they have in it. A delegate to the Printing Pressmen's Convention said, with reference to the promotion of helpers in the printing business, that when a man who does not belong to a union gets a job, he is taken in, and he asked if a man should be refused the privilege of promotion because he is a loyal union assistant.[8]

In very few of the unions which have made provision for admitting helpers to membership and have also some provision for promoting helpers to journeymen are the helpers given rights and privileges sufficient to draw them into the union. Few helpers want to join a union which stipulates that no helper can be advanced in the trade to the detriment of journeymen or apprentices.[9] For instance, a boiler maker's helper, discussing the rights of the helpers to hold office in the Brotherhood of Boiler Makers, said if there was so much opposition to helpers holding office, he for one did not want to be taken in with the boiler makers.[10]

The failure, or at least the lack of success, of the unions in their efforts to organize the helpers is due chiefly to the efforts of journeymen to restrict the promotion of helpers and secondarily to the opposing views of helpers and journeymen as to what should be the rights and privileges of helpers as union members. If helpers in large numbers ever come into the unions and work in harmony with the journeymen, these differences of opinion must in some way

[7] In letter to the writer.
[8] Proceedings, 1899, p. 69.
[9] Constitution to Govern Machinists' Helpers, 1911, art. i.
[10] Proceedings, 1912, p. 128.

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be diminished. The welfare of the crafts would seem to demand that journeymen should retain control in their respective unions. Otherwise, if helpers should in any case have a majority of members in a union, their eagerness for increased wages and rapid promotion might work harm to the union. On the other hand, fairness to helpers and social interest demand that all limitations upon the promotion of helpers, other than the ability to command the standard wage, should be abolished. This would take away from helpers the belief that limitations on their rights and privileges as union members are mainly for the purpose of retarding their advancement. It is not likely that helpers would refuse to join a union merely because they did not have the same rights as journeymen provided there were no arbitrary restrictions to keep them from becoming journeymen.

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VITA

John H. Ashworth was born in Bland County, Virginia, October 19, 1879. He received his preliminary education in the public schools of that county. In 1901 he entered Emory and Henry College, where he graduated in 1906 with the degree of Bachelor of Arts. In 1906–1907 he was principal of the high school at Wise, Virginia, and from 1907 to 1911 he was principal of the high school at Norton, Virginia. In 1911 he entered the Johns Hopkins University, taking graduate work in political economy, political science, and history. He was Fellow in Political Economy in 1912–1913, and Fellow by Courtesy in 1913–1914. He received the degree of Doctor of Philosophy in 1914.

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SERIES XXXIII NO. 4

JOHN HOPKINS UNIVERSITY STUDIES
IN
HISTORICAL AND POLITICAL SCIENCE
Under the Direction of the
Departments of History, Political Economy, and
Political Science

THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN

BY

FLOYD BARZILIA CLARK, Ph.D.
Assistant Professor of Political Science in Pennsylvania State College

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PREFACE

Two temptations assail writers of biographies, or of studies of a similar kind,—to overestimate or to underestimate. It is hard for the student of a man's career to see both sides, and after giving due consideration to each, to form a fair judgment. Throughout this study I have been aware of these two dangers, but I am not sure that in all respects they have been avoided.

It needs to be emphasized that in studying the constitutional doctrines of a single great judge as found in his dissenting opinions, the prevailing opinions of the court must of necessity appear at their worst, for the criticisms of the minority are of course directed at the weak points in the reasoning of the majority. In so far, then, as I have accepted Justice Harlan's arguments and found unconvincing the rulings of the Supreme Court, it must be remembered that I am criticising only the weaker points of a few decisions of that great tribunal.

This study was prepared partly at the Summer School of Columbia University, but principally in the Department of Political Science of the Johns Hopkins University. I wish to express my gratitude for suggestions made by Mr. A. M. Groves, a graduate student of this University, who read the manuscript before it went to press; I owe to Professor T. R. Powell, of New York, my knowledge of many of the basic principles of constitutional law; but the study was prepared under the direction of Dr. W. W. Willoughby, of the Johns Hopkins University, without whose aid its production would not have been possible.

F. B. C.

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THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN

INTRODUCTION

John Marshall Harlan was born on June 1, 1833, in Boyle County, Kentucky. His father, the Honorable James Harlan, was an active lawyer of that State, and christened his son for the judgeship, giving him the name John Marshall in honor of that highly respected formulator of the principles of our constitutional law. The subject of our study grew up at a time when the air was hot with abolition sentiment, and in a State where opinion was sharply divided. Though his father was not an abolitionist, he was an emancipator, and some time before the war he set his slaves free. The young Harlan imbibed this spirit of emancipation, and when the test came he espoused the cause of freedom. He and his father fought valiantly to turn the tide of opinion in Kentucky against secession, and were influential in preventing that State from joining the Confederacy. When Kentucky refused to furnish its quota of soldiers to the Union, Harlan was one of those who volunteered to fight on the northern side. He organized a regiment of militia, and led them in battle against the South. He was thus, to start with, colonel of the Tenth Kentucky Infantry, but he rose rapidly in rank, and in 1863 was acting-commander of a brigade. At this time, however, the death of his father made it necessary, for family reasons, that he return to civil life. At the time of his resignation from the army his name had just been sent by Mr. Lincoln to the Senate as a full brigadier-general, but his services in the army were ended. He remained loyal to the northern cause throughout his career, and many times asserted his disapproval of the deprivation of the rights which the

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negroes were supposed to have obtained by the new amendments to the Constitution of the United States.

Mr. Harlan received his education at Centre College, Kentucky, where he received the degree of A.B. in 1850, and at Transylvania University, where he studied law. The degree of LL.D. was conferred on him by the following institutions: Bowdoin in 1883, Centre College and Princeton in 1884, and the University of Pennsylvania in 1900. From 1889 to his death in 1911 he was professor of constitutional law at the George Washington University, in Washington, D. C.

He married Miss Malvina F. Shanklin, of Evansville, Indiana, December 23, 1856, and had a long and happy married life. His three sons, Dr. Richard Davenport Harlan, the Honorable James S. Harlan, and Mr. John Maynard Harlan, occupy prominent positions in the service of the nation. The oldest, Dr. Richard Davenport Harlan, holds a high position as an educator, the second is a member of the Interstate Commerce Commission, and the youngest is an attorney-at-law in Chicago.

Before and during his service as associate justice of the Supreme Court, Mr. Harlan held responsible appointments outside of his regular service as judge. He was twice candidate for the governorship of Kentucky, and was attorney-general of that State from 1863 to 1867. His entrance into national affairs was marked by the part which he took in the Cincinnati Republican Convention of 1876, which nominated Mr. Hayes as Republican candidate for the presidency. In this convention he was leader of the forces for the nomination of General B. H. Bristow, a member of Grant's Cabinet; but when Bristow's nomination became impossible, his supporters united with others for the nomination of Mr. Hayes. When Hayes was elected to the presidency, he wished to appoint a representative lawyer from Kentucky as one of his Cabinet and offered the attorney-generalship to Mr. Harlan, who, however, did not see his way clear to accept.

Mr. Harlan's appointment by President Hayes upon the

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so-called Louisiana Commission was a notable incident in his career. The purpose of the commission was to aid in the settlement of an election dispute in Louisiana. This commission must of course be distinguished from the state Returning Board which had been appointed at an earlier date to examine election returns in that State. The Returning Board had given the state vote to Hayes in the national election, and had likewise turned the governorship of the State over to the Republican candidate. The Republicans wished to get the support of the national army to secure them in power, and appealed to Hayes to this end. To clear up the situation the Louisiana Commission was appointed. The members of the commission, being appointed by the President and reporting only to him, had no powers, but were to hear the complaints of both sides and to serve as a safety valve to the pent-up grievances. They soon found that the return of the federal army to the State was unwise. Owing to the fact that the property owners voluntarily sent in their taxes to the Democratic organization, its opponents soon disbanded for lack of funds, and the situation settled itself. The commission was doubtless influential in helping to undo some of the crooked work of the Returning Board. It was an honor to have been upon a board, the majority of whose members were Republicans, which was honest enough to recommend that the Democratic government be upheld at a time when one would not have expected such a recommendation. Mr. Harlan's sense of honor must have helped greatly in maintaining the integrity of the commission.

Mr. Harlan also served as one of the American arbitrators on the Behring Sea Tribunal, which met in Paris in 1893 to settle the dispute between the United States and England over the Alaskan seal fisheries. An eyewitness said of his appearance on this occasion: "I can never forget a scene I once witnessed in Paris, when the Behring Sea Arbitration Tribunal was sitting there, with John Marshall Harlan of Kentucky, at one end of the court and John

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Tyler Morgan of Alabama at the other. Both were then in the Indian Summer of their manhood—Harlan with his noble and matchless form, the God-gifted Morgan, with his beautiful face and head that sculptors and painters might have loved to copy. My heart swelled with pride as I looked upon those two great American citizens, who had been opposing generals in the Civil War, and fancied that I saw in them reproductions of Brutus and Cicero."[1]

Mr. Harlan was simple and childlike in his daily conduct, fond of home, and of his home people and relatives. He was deeply religious in his nature. He honored the Constitution of the United States, and the Bible seemed to be the only thing that he placed above it. "The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always vox Dei, the former, vox populi, was no less so."[2]

He deeply loved his State as well as his nation. "I remember when the case of Taylor v. Beckham was argued in this court. At that time intense feeling existed in Kentucky. It was indeed a period that tried men's souls as well as appealed to the sound judgment of the people of our State. During the argument the sympathies of Justice Harlan were so awakened that he shed tears."[3]

Mr. Harlan was associate justice of the Supreme Court of the United States for nearly thirty-four years, from December 10, 1877, until his death on October 14, 1911. Though he was appointed by President Hayes immediately after his return from service on the Louisiana Commission, there was nothing in that experience that would speak for political reward. Furthermore, his whole career shows that he would not have accepted an appointment merely for political reasons.

His term of service was exceeded in length by only two

[1] Remarks of Mr. Hannis Taylor in Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of John Marshall Harlan, Dec. 16, 1911. P. 30.
[2] Remarks of Attorney-General Wickersham, in ibid., p. 45.
[3] Remarks of William Bradley, in ibid., p. 27.

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justices,—Marshall and Field, in each case by less than a year. His labors were not surpassed, however, by these men of longer service. Something more than seven hundred decisions wherein he spoke for the majority bear his name, and his dissenting and concurring opinions pass the hundred mark.

While a justice he was more than a judge. His interest went further than a contemplation of the arguments bearing on the cases, and he thought deeply outside of questions of constitutional importance, although he was reluctant to express his opinion upon great issues likely to be brought before the court. In a letter to a young friend, written August 12, 1911, only two months before he died, he made the following comments in reference to the conditions under which new States should be admitted into the Union: "I hope that the President will put his feet down firmly upon the recall of judges in Arizona and New Mexico, while in territorial condition. It is one thing for these people, *after becoming States,* to amend their constitutions, and provide for the recall of judges. It is quite a different thing for Congress to give its *sanction* to the principle of the 'recall' by admitting these Territories into the Union with constitutions providing for the recall of judges. No people, it seems to me, are fit to come into the Union as States who are willing to put the 'recall' of judges into their fundamental law. Whether a particular Territory shall be admitted into the Union as a State is a matter of discretion with Congress. That discretion should be exercised so as to maintain sound principles that are recognized as such by Anglo-Saxon people. Upon the question whether the 'recall' of judges is republican in the constitutional sense, I express no opinion; for that question may come up for judicial determination. I only speak for the 'recall' as a matter of public policy."[4]

This is in itself an interesting doctrine. All recognize certain things that a State may do which are not unconstitutional but which may not meet the approval of the other States. Though a State may do these things after it is ad-

[4] Remarks of Blackburn Esterling, in ibid., p. 36.

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mitted into the Union, it would not be wise for Congress to put itself on record as approving them by admitting new States with such provisions in their constitutions. It would be far better for the State to break its promise, so far as the nation is concerned, after it had been admitted into the Union, than it would be for Congress to sanction the obnoxious provisions.

As a hearer of arguments Justice Harlan was more than a scrutinizer of points made by lawyers; he sometimes sought to train the lawyer who argued before the court. The following story with regard to this trait is told by a lawyer: "Something like two years ago I was called here to argue a case in which a sovereign State was the complainant, and my associate was a talented young lawyer who was letter perfect in that case, but who had never before appeared in this court. The matter was to be presented on a motion for which under the rules as they stood, an hour was allowed on each side, and I suggested that my associate should open case, intending that if he presented it satisfactorily I would leave him to occupy the entire time alloted to us; but he was so full of his case that he began the presentation of it in a way that would have required hours. I was growing a little nervous over the situation myself, but I hesitated to interrupt him, because I thought it might confuse him, and just as I was debating with myself what it was best to do, Judge Harlan called on him in a stern voice to 'come to your point.' My young friend, confused beyond description, managed to say that he was coming to it; but Judge Harlan replied that his time would be consumed before he reached it, and that in the meantime the court would have no idea of the question he was presenting to it. It was a trying experience for a new member of the bar, and I felt it so keenly that I shared the young man's resentment. A few days afterwards I happened to meet Judge Harlan as he was coming to the Capitol, and told him bluntly that I regarded his rebuke of that young man as a little less than cruel. Instead of exhibiting an irritation, which would have been entirely permissible against a member of his bar who

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had presumed to criticise his conduct, he turned to me, and, smiling said: 'My dear Senator, you do not understand my purpose. I saw that the young man was embarrassed by his surroundings, and I desired to relieve him from embarrassment.' I told him that I thought he had chosen a curious way of producing such a result, and he advised me to watch that young man when he next appeared in this court. It so happened that a reargument of that very case was ordered, and when my associate and myself appeared here to argue it at the next term, I found Judge Harlan's remedy for a lawyer's embarrassment completely justified."[5]

Few adverse criticisms have been made of Mr. Harlan as a judge. He was a militant justice, but his militancy was on the side of law. Even with the many dissents rendered by him there is no evidence of hard feeling on the part of his associates. He did not bear malice with his disagreement, but he was often very vehement in his dissents.

His opinions and dissents often contained extraneous matter, that is, reference to circumstances which had no direct bearing upon the case. But these are easily passed over when one is looking for his argument. The presence of these digressions is more an evidence of his general interest in the public than it is of his lack of knowledge of the principles of legal argumentation.

Some have claimed that Justice Harlan emphasized too greatly the letter of the law. Such a contention is based either on ignorance or on prejudice. One illustration will show this point. No one who so interpreted the eleventh amendment as to maintain that a suit against the officer of a State in his official capacity was not a suit against a State could have held to the strict letter of the law. When, by a logical and grammatical construction a law could be made to correct the evils intended to be remedied by it, he argued that this should be done. But if such an application meant an absolute change in the law, he held that this change should be left to the legislative power. The criticism that he stressed too emphatically the letter of the law arises from the fact that he did not believe in equivocation.

[5] Remarks of Joseph W. Bailey, in ibid., pp. 21–22.

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CHAPTER I

Suability of States

The suability or non-suability of a State has been before the Supreme Court of the United States in numerous instances. It has arisen under various circumstances, and the court has given on this question many opinions which it is difficult to reconcile. It is a complicated question, and no attempt will be made to give an exposition of the whole matter. Interest centers around Justice Harlan and the views which he has held on the subject. He had a very decided opinion on this point, and he almost never failed to assert himself whenever the matter was before the court.

Article i, section 10 of the constitution of the United States places the following prohibition upon the States: "No State shall . . . pass any . . . law impairing the obligation of contracts"; and the fourteenth amendment provides that "no State shall . . . deprive any person of life, liberty or property, without due process of law." But the eleventh amendment expressly stipulates that the courts of the United States may not entertain a suit against a State. Suppose, therefore, a State takes property without due process of law for its own use or passes a law impairing the obligation of its own contracts, what action can the individual take in order to receive the benefit of these stipulations? Such a question, of course, opens up the whole problem as to what is to be termed a suit against a State, for if the law takes property without due process of law or impairs the obligation of contracts, the law is unconstitutional even though the State itself be a party to the proceedings. At the same time, if the action to prevent the enforcement of the law amounts to a suit against the State, it cannot be maintained. Therefore, the problem is almost that of an

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irresistible force meeting an immovable body. Shall the immunity from compulsory judicial process be upheld, or shall the prohibitions relative to contracts and due process of law be enforced? In many cases one or the other but not both of these ends can be realized. It is clear that here there is abundant opportunity for difference of opinion according to which one of these constitutional mandates is maximized and which one minimized. As will be found, the court has sought to maintain a middle course, and in so doing has not always been consistent in the doctrines which it has declared.

Discussion of Cases.—Justice Harlan's views with reference to this subject appear especially in the dissents which he rendered in Louisiana v. Jumel, 107 U. S. 711, and Ex parte Young, 209 U. S. 123. The first, Louisiana v. Jumel, decided that a certain action against the treasurer of the State of Louisiana was a suit against the State and hence could not be entertained; while the other, Ex parte Young, decided that a certain action against the attorney-general of Minnesota did not constitute a suit against a State and hence could be entertained by the court. In neither of these cases was the action on account of any private act of the person concerned, but because of the official acts of each. The fact that the latter decision allowed the suit and the former did not makes the cases typical; and the fact that Justice Harlan dissented from each affords an opportunity to deduce from them his exact opinion on this subject.

The case of Louisiana v. Jumel was decided in 1882. The facts in the case were briefly these: The legislature of Louisiana provided in 1874 for an issue of bonds, for the purpose of consolidating and reducing the floating and bonded debt. The bonds were to be payable to the bearer forty years from January 1, 1874, and to bear interest at the rate of seven per cent, payable the first of January of each year. The bonds were to be signed by the governor, the auditor, and the secretary of state, and the coupons by the auditor and the treasurer. The State levied a tax for

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the purpose of meeting the above obligations, and immediately thereafter passed an amendment to the constitution making the bonds create a valid contract between the State and every holder of such bonds, which the State could in no wise impair. Certain persons held bonds to the amount of $20,000 and unpaid coupons, due January 1, 1880, to the amount of $79,900.

On the first day of January, 1880, a new constitution of Louisiana went into effect. A portion of that constitution aimed to alter the former provisions of 1874. It reduced the interest to be paid on the consolidated bonds from seven per cent to two, and further stipulated that coupons of said consolidated bonds falling due on the first day of January, 1880, should be remitted, and that the proceeds of the taxes which had been collected for the purpose of meeting these obligations, of which there were $300,000 in the treasury, should go to defray other expenses of the State.

Holders who presented their bonds for payment were refused because of this action of the State, whereupon they contended that this action of the State impaired the obligation of contracts. They therefore brought suit against the treasurer of the State to compel him to make payment according to the previous legislation of the State. The state treasurer entered the plea that such a suit was a suit against the State and as such was forbidden by the eleventh amendment to the Constitution of the United States. The circuit court of the United States pronounced this a valid plea, and upon appeal to the Supreme Court this decision was sustained.

The grounds for this decision were these: It was evident that the State designed to make promises and pledges in such a manner that they would be protected by the Constitution of the United States; and that the State, in adopting the debt ordinance of 1879, designed to stop further levy of the promised tax and to prevent the disbursing officer from using the revenue from previous levies to pay the interest falling due January 1, 1880, as well as the principal and

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interest maturing thereafter. If the State could be sued, there was little doubt that this later state action would be pronounced an impairment of the obligation of the State's contract. The question was whether the contract could be enforced, notwithstanding the provision in the new state constitution, by coercing the agents and officers of the State, whose authority to act had been withdrawn, without the State itself being made a party to the proceedings. By the original statute these officers were directed to use the money in the treasury in one way; by the new constitution they were directed to use it in another way; by the statute they had to raise more money by taxation, but by the constitution it was ordered that this should not be done. The officers owed their duty to the State, and had no contract relations with the bondholders. They could be moved through the State, but not the State through them. In short, then, the officers had always to obey the will of the State, and if this will changed the action of the officers had to change accordingly.

The first precedent cited by the Supreme Court was Reg. v. Lords Com. of the Treas., Law Rep. 7 Q. B. 387, in which the court of Queen's Bench of England refused to take cognizance of a case when an amount of money had been raised for a specific purpose and appropriated by Parliament for another purpose. In this case it was held that a suit entered against the Lords Commissioners of the Treasury was a suit against the sovereign and not valid. The Supreme Court of the United States claimed a similarity between the two cases in that the former was a suit against the commissioners of the treasury of England, and the latter was against the state treasurer of Louisiana.

As to this point, Justice Harlan in his dissent said: "It seems to me that case furnishes no support for the suggestion that these are suits against the State, simply because they are brought against its officers. It does not conflict with the proposition that the state Treasurer can be compelled to apply the proceeds of these taxes as stipulated in

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the Statute and Constitution of 1874, which were his sole authority to receive them. Here *is a statutable* obligation upon him to pay the coupons as they matured. And to that is added the obligation imposed by that Constitution, which, in terms, declares that the proceeds of taxes collected under the Act of that year 'Shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due,' without further legislative authority. These obligations remain upon that officer, unless it be that the Debt Ordinance, although unconstitutional and void, has discharged them. Had Parliament, instead of the Act involved in the case cited, passed one directly imposing upon the defendants the duty of paying out of moneys appropriated for that purpose a certain class of claims, it is manifest that the court of Queen's Bench would have compelled them, by *mandamus* or other process, to perform that duty. In the case supposed, there would have been a statutable obligation which the court would not have permitted the defendants to evade on the pretext that they were officers of the Crown." Hereupon Justice Harlan cites a case in which this very condition arose and in which the court issued such a mandamus, and shows further that the fact that the Constitution of the United States forbids that any State impair the obligation of contracts makes more powerful the statutory force; and further that the difference in the nature of the sovereign in England from that of the sovereign here shows that little weight should be given to the English decision.

In short, then, Justice Harlan's reply was this: The English court did not entertain the suit because there was a statutable obligation upon them not to do so; the American courts should have entertained the suit because there was a statutable obligation upon them to do so,—a statutable obligation not altered because of the unconstitutional amendment which tried to relieve Louisiana of its duly contracted debts.

The next case cited by the court for precedent is Os-

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born v. Bank of the United States, 9 Wheat. 738. The argument of the majority opinion is that there was a great difference between this case and the Louisiana case. In the Osborn case "the object was to prevent money which had been unlawfully taken out of the bank by the officers of the State from getting into the Treasury. . . . Thus the money seized was kept out of the Treasury, because if it got in, it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the Treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the State. Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the Treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction."

Justice Harlan in his comment on this reasoning said: "The latter was a suit to recover moneys, which officers of the State of Ohio, in conformity with its statutes, had illegally taken from a bank of the United States. The suit being against the officers of the State, the objection was taken that it could not be sustained without the State itself being a party; that the State could not be sued; consequently, it was argued, the relief prayed (the restoration of the money) could not be granted. But to that objection the court, speaking by *Chief Justice* Marshall, . . . said: 'If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sus-

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tained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him could his principal be joined in the suit.'"

Justice Harlan noted that this decision had never been questioned before: "It seems to establish, upon grounds which cannot well be shaken, that a suit against state officers, to prevent a threatened wrong to the injury of the citizen, is not necessarily a suit against the State within the meaning of the 11th Amendment of the Constitution." Thus it appears that the argument on the part of the court was purely technical—it was rather in words than in meaning—and was, as Justice Harlan makes clear, a departure from what the court had previously maintained.

Davis v. Gray, 16 Wall. 203, is next mentioned by the court as affording grounds for its decision: In a land grant the receiver of a railroad "obtained an injunction against the Governor and Commissioner of the Land-Office of Texas to restrain them from incumbering, by patents to others, lands which had been contracted to the railroad company. . . . The specific tracts of land in dispute were, by the contract which had been made, segregated from the public domain and set apart for the company. The case rests on the same principle it would if patents had been actually issued to the company, and the State, through its officers, was attempting to place a cloud on the title by granting subsequent patents to others."

Justice Harlan recognized that a full statement of the

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point at issue is sufficient to make the citation argue against the conclusion of the court. He says: "In that case it appears that the State of Texas made a grant of lands to a railroad company, upon the basis of which bonds were issued known as land-grant mortgage bonds. They were sold in large numbers in this country and Europe. Subsequently the State, by provisions of its statutes and Constitution, attempted to repudiate and nullify its contract; and, in pursuance thereof, its officers proposed to issue patents to others for a part of the lands embraced in this grant. Thereupon a suit in equity was instituted in the Circuit Court of the United States against the Governor and the Commissioner of the General Land-Office of Texas, to prevent them from issuing patents for the lands or any part of them. The State was, of course, not made a party on the record. The bill was demurred to upon the ground that she could not be sued, and that the suit, being against her officers, was one, within the meaning of the Constitution, against her. The demurrer was overruled, and the relief asked was given."

He further explained that Justice Swayne, in rendering this decision, stated the following principles as having been announced in Osborn v. Bank of the United States: "1. A Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution, or a statute of the United States, when such execution will violate the rights of the complainant. 2. Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. 3. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, although her laws prompt his action and the State stands behind him as the real party in interest. . . . It was in conformity with those doctrines that the relief asked was given."

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Two other cases were referred to in the argument for the court, namely, Board of Liquidation v. McComb, 92 U. S. 531, which arose under the same act as the case now under consideration, and United States v. Lee, 106 U. S. 196. It is hardly necessary to discuss these cases further, for the same sort of distinction was made by the court, and equally conclusive replies were made by Justice Harlan. Both were suits entertained against officers, the former against an officer of Louisiana, and the latter against officers of the United States. In both the officers were sued in their official capacity and the decisions were rendered against them.

In closing his dissent, Justice Harlan said: "My own conclusions are: That the officers of Louisiana cannot rightfully execute provisions of its constitution which conflict with the supreme law of the land, and the courts of the Union should not permit them to do so;

"That but for the adoption of the unconstitutional Debt Ordinance of 1879, and whether the suits were in a state court or in the Circuit Court of the United States, these state officers would have been restrained by injunction from diverting the funds collected to meet the interest on the consolidated bonds, and would have been compelled, by *mandamus*, to perform the purely ministerial duties enjoined by the Statute and Constitution of 1874;

"That if, by existing laws, the Circuit Court of the United States has no power to issue such writs, still, upon the removal of the *mandamus* suit from the state court, the former had power to do what the state court could legally have done had there been no removal; *viz.:* make peremptory the alternative *mandamus* granted at the beginning of the suit by the inferior state court;

"That the Debt Ordinance being void because in conflict with the Constitution of the United States, furnishes no reason whatever, least of all in the courts of the Union, why the relief asked should not be granted by any court of proper jurisdiction as to parties;

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"That to refuse relief because of the command of a State to its officer to do that which is forbidden, and refrain from doing that which is enjoined, by the supreme law of the land; or to give effect, for any purpose, in the courts of the Union, to the orders of the supreme political power of a State, made in defiance of the Constitution of the United States, is, practically, to announce that, so far as judicial action is concerned, a State may, by nullifying provisions in its fundamental law, destroy rights of contract, the obligation of which the Constitution declares shall not be impaired by any state law. To such a doctrine, I can never give my assent."

In Ex parte Young, 209 U. S. 123, there appears to be the same sort of contention as that which arose in Louisiana v. Jumel. In this case, however, the court decided that an injunction against the attorney-general of the State of Minnesota issued by the circuit court of the United States to prevent his putting into effect certain laws would hold, in spite of the plea that such an action was against the State of Minnesota.

The case arose after a number of decisions along the same line as Louisiana v. Jumel, in all of which Justice Harlan consistently asserted the doctrine which he had just announced. A statement at the beginning of his dissent in the Young case might seem to indicate that he had given up the theory which he had so tenaciously held, but as his argument is examined more deeply this is found not to be true. His doctrine is essentially the same, and this case had made him alter only slightly one phase of it. This point will be explained later. The words are as follows: "Although the history of this litigation is set forth in the opinion of the court, I deem it appropriate to restate the principal facts of the case in direct connection with my examination of the question upon which the decision turns. . . . That examination, I may say at the outset, is entered upon with no little embarrassment, in view of the fact that the views expressed by me are not shared by my brethren.

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I may also frankly admit embarrassment arising from certain views stated in dissenting opinions heretofore delivered by me which did not, at the time, meet the approval of my brethren, and which I do not now myself entertain. What I shall say in this opinion will be in substantial accord with what the court has heretofore decided, while the opinion of the court departs, as I think, from principles previously announced by it upon full consideration. I propose to adhere to former decisions of the court, whatever may have been once my opinion as to certain aspects of this general question."

When his arguments are examined more closely it is found that the "certain views stated in dissenting opinions heretofore delivered by me . . . which I do not now myself entertain" refer only incidentally to his general doctrine as to the suability of a State, for, as will be seen, his real opinion on this question comes out more clearly in this dissent than in any of the others.

Upon examination, the case of Ex parte Young is found to be a very difficult one. It was an action brought in the circuit court of the United States by a railroad company to prevent the State of Minnesota from enforcing certain laws which the company claimed were confiscatory and hence deprived them of property without due process of law. The acts were so stringent in their nature as to make it almost impossible for the company to have their case tried in any court to test the validity thereof. For this reason the complainants alleged that the above-mentioned orders and acts deprived them of the equal protection of the laws, and also deprived them of their property without due process of law, and hence were unconstitutional and void. The acts were very stringent because of the following characteristics: In the first place, it was practically impossible to have their constitutionality tested because of the severe penalties imposed if the Supreme Court should pronounce them constitutional. They could get no officer or employee of the railroad company to take the risk. In the second place, the

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fines for breaking the laws were so great as almost to put the company out of business before the Supreme Court could pass on it. About the only recourse that the railroad had was to get the United States circuit court to issue an injunction forbidding the state attorney-general to put these laws into operation. This was done; and the Supreme Court sustained the writ.

With the issue clearly understood, the nature of the arguments of the court and of Justice Harlan's dissent can be examined. The question, of course, for the court to decide was whether such an injunction constituted a suit against the State within the meaning of the eleventh amendment to the Constitution, as was contended by the attorney-general of the State.

Justice Peckham, speaking for the court, in his preliminary remarks said: "We have, therefore, upon this record, the case of an unconstitutional act of the state legislature and an intention by the attorney-general of the state to endeavor to enforce its provisions, to the injury of the company, in compelling it, at great expense, to defend legal proceedings of a complicated and unusual character, and involving questions of vast importance to all employees and officers of the company, as well as to the company itself. The question that arises is whether there is a remedy that the parties interested may resort to, by going into a Federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and, if the question be finally decided favorably to the contention of the company, a permanent injunction restraining all such actions or proceedings." Many cases are cited which have involved the question of the suability of States, but the line of sequence attempted to be established by these citations is difficult to follow.

Justice Harlan said: "If a suit be commenced in a state court, and involves a right secured by the Federal Constitu-

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tion, the way is open under our incomparable judicial system to protect that right, first, by the judgment of the state court, and ultimately by the judgment of this court, upon writ of error. But such right cannot be protected by means of a suit which, at the outset, is directly or in legal effect, one against the state whose action is alleged to be illegal. That mode of redress is absolutely forbidden by the 11th Amendment, and cannot be made legal by mere construction, or by any consideration of the consequences that may follow from the operation of the statute. Parties cannot, in any case, obtain redress by a suit *against the state*. Such has been the uniform ruling in this court, and it is most unfortunate that it is now declared to be competent for a Federal circuit court, by exerting its authority over the chief law officer of the state, without the consent of the state, to exclude the state, in its sovereign capacity, from its own courts when seeking to have the ruling of those courts as to its powers under its own statutes. Surely, the right of a state to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a Federal court. The preservation of the dignity and sovereignty of the states, within the limits of their constitutional powers, is of the last importance, and vital to the preservation of our system of government. The courts should not permit themselves to be driven by the hardships, real or supposed, of particular cases, to accomplish results, even if they be just results, in a mode forbidden by the fundamental law."

Referring to In re Ayers, 123 U. S. 443, a case in which a suit against the attorney-general of the State of Virginia had been pronounced a suit against the State and hence void, Justice Harlan, apparently to show how far the present decision was inconsistent with others, made the following remarks: "The proceeding against the attorney-general of Virginia had for its object to compel, by indirection, the performance of the contract which that commonwealth was alleged to have made with bondholders,—such performance, on the part of the State, to be effected by means of orders

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in a Federal circuit court directly controlling the official action of that officer. The proceedings in the . . . suit against the attorney-general of Minnesota had for its object, by means of orders in a Federal circuit court, directed to that officer, *to control the action of that state* in reference to the enforcement of certain statutes by judicial proceedings commenced in its own courts. The relief sought in each case was to control the state *by controlling the conduct of its law officer, against its will.* I cannot conceive how the proceeding against the attorney-general of Virginia could be deemed a suit against that state, and yet the proceeding against the attorney-general of Minnesota is not to be deemed a suit against Minnesota, when the object and effect of the latter proceeding was, beyond all question, to shut that state entirely out of its own courts, and prevent it, through its law officer, from invoking their jurisdiction in a special matter of public concern, involving official duty, about which the state desired to know the views of its own judiciary. In my opinion the decision in the Ayers case determines this case for the petitioners." As Justice Harlan had dissented from the Ayers case, it would appear from the above that he is pleading with the court at least to stand by something.

Since the concern in this case is not so much with Justice Harlan's replies to arguments given by the court as with his opinion definitely stated, it will be well to note his quotation from Fitts v. McGhee, 172 U. S. 516, in which case he had written the opinion: "'In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases. . . . Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction

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of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney-general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney-general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.' . . . The Fitts case is not overruled, but is, I fear, frittered away or put out of sight by unwarranted distinctions."

The fact that Justice Harlan in this dissent quoted ap-

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provingly from Fitts v. McGhee the opinion as to what should be regarded as the law relating to suits against state officers shows that his embarrassment at the change of view which he had undergone did not mean that he had entirely given up his theory. It rather indicates that he had formed more clearly within his own mind exactly what was his doctrine. The case of Ex parte Young had brought one phase of the subject before him which apparently he had not fully appreciated till then, that is, the possibility that a citizen, by means of an injunction issued by a circuit court of the United States, could stay the action of the State in the enforcement of its laws. To that extent, then, he seems to have changed his mind, but no further. The above quotation puts as clearly as can be put Justice Harlan's opinion of the extent to which the interpretation of the eleventh amendment should go. In brief, it might be stated as follows: Everything that might arise in a judicial way that would involve an officer in his public capacity ought not to be deemed a suit against the State, and hence invalid. And if an officer of the State should be called into court because of a definite act on his part, so long as the averment was made that he was acting under an unconstitutional statute he should be made to answer. His objection to the decision in Ex parte Young seems to be twofold, however. The first objection was that the officer was proceeded against under an averment that the general provisions of the statute were unconstitutional rather than for a definite act on his part under a statute the constitutionality of which was challenged. In the second place, he objected because by such action the circuit court was blocking the legal processes of the State. Through this means the court had given to the individual the power to halt the action of the State, and had therefore in essence violated the Constitution of the United States in abridging the powers duly allowed to the States by that instrument.

These two cases show clearly Justice Harlan's opinion as to what should be the interpretation of the phrase "suits

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against States." It remains, however, to be seen, by means of a brief comment on other dissents and opinions rendered by him on this subject, how consistently he held to this principle.

The decision of Louisiana v. Jumel was given in 1882. At that time Justice Harlan had been on the bench only five years. This case marks the first departure of the court from what seemed to be a well-established precedent as to the meaning of the eleventh amendment. Usually Justice Harlan was not very careful to avoid extraneous matter in his dissents, but in this case it was not so. Probably no other of his dissents surpasses this one in clear and concise reasoning. From this point on to the case of Ex parte Young will be traced his opinions and dissents in the more important cases which have included that question. The most important cases are: Antoni v. Greenhow, 107 U. S. 769; Cunningham v. Macon and Brunswick R. Co., 109 U. S. 446; Hapgood v. Southern, 117 U. S. 52; In re Ayers, 123 U. S. 443; Belknap v. Schild, 161 U. S. 10; Fitts v. McGhee, 172 U. S. 516; Tindal v. Wesley, 167 U. S. 204; International Postal Supply Co. v. Bruce, 194 U. S. 601.

In the case of Antoni v. Greenhow the vexed question of the suability of States came up only incidentally. This case was decided next after Louisiana v. Jumel, and involved a similar situation. In 1871 Virginia passed a law making the interest coupons of a bond issue receivable at and after maturity for all taxes, debts, dues, and demands of the State. Later the General Assembly passed another act prohibiting the officers in charge of the collection of taxes from receiving in payment anything else than gold, coin, and so on. Subsequent to the passage of this act making it unlawful to accept such coupons for taxes one Andrew Antoni attempted to pay taxes with interest coupons. Upon the refusal of the officer to accept them, Antoni took the matter into court. The question was taken to the Supreme Court of the United States by writ of error on the ground that this subsequent legislation was an impairment

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of the obligation of contracts. By nice distinctions it was decided that such action on the part of the State did not impair the obligation of contracts, and the question of suability was put aside as not being of necessity decided in this case.

Justice Harlan, still warm from his dissent in the Louisiana case, made the following remark: "It should be remembered that the court places its decision upon the ground that the change in the remedy has not, in legal effect, impaired the obligation of the contract, and not upon the ground that this suit is, within the meaning of the Federal Constitution, a suit against the State. Nor could it be placed upon the latter ground without overturning the settled doctrines of this court. . . . It is a case in which a plain official duty, requiring no exercise of discretion, is to be performed, and where performance in the mode stipulated by the contract is refused."

Cunningham v. Macon and Brunswick R. Co. brings up again the interpretation of the eleventh amendment. The facts in this case were as follows: The State of Georgia endorsed the bonds of a railroad company, taking a lien upon the railroad as security. The company failing to pay interest upon endorsed bonds, the governor of the State took possession of the road, and put it into the hands of a receiver, who made sale of it to the State. The State took possession of it, and took up the endorsed bonds, substituting the bonds of the State in their place. The holders of the mortgage bonds issued by the railroad company subsequently to those endorsed by the State, but before the default in payment of interest, filed a bill in equity to foreclose their own mortgage and set aside the said sale and to be let in as a prior in lien, for other relief affecting the property, and set forth the above facts and made the governor and the treasurer of the State parties. Those officers demurred, and it was held that the State was so much interested in the property that relief could not be granted without making it a party, and that the court was without jurisdiction.

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The argument of the court was very similar to that in Louisiana v. Jumel. Without going into the content of Justice Harlan's dissent, his opinion may be summarized as follows: In deciding the case the court had overlooked certain vital points which would have proved that the State was not legally in possession of the property. Hence the suit against the officers of the State should have been entertained to establish this fact, and to put the property into the hands of the legal owners. The court in this case seemed to say that the mere plea of possession in the name of the State exempts from suit, whereas Justice Harlan desired that the legal status of this possession be established and that this be done by entertaining a suit against the officers of the State.

In Hapgood v. Southern, another case involving the issue of bonds, the same question was to be answered as in Louisiana v. Jumel. Justice Harlan admitted that this case was governed by that decision, but denied again the rightfulness of it.

Since the case of In re Ayers has been referred to and sufficiently explained, it is unnecessary to go further into its details. In his dissent from this case Justice Harlan quoted approvingly a precedent cited in United States v. Lee from Osborn v. Bank of United States as follows: "Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In the following quotation from Justice Harlan's dissent

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from Belknap v. Schild is found a good illustration of his vehemence when he opposed vigorously the decision of the court: "If the United States may appropriate to public use the invention of a patentee, without his consent, and without liability to suit, as upon implied contract, for the value of the use of such invention; if, as the court holds, a public officer acting only in the interest of the public is not individually liable for gains, profits, and advantages that may accrue to the United States from such use; and if the officer who thus violates the rights of the patentee cannot be restrained by injunction,—then the government may well be regarded as organized robbery so far as the rights of patentees are concerned."

It had been decided by the court that in a suit in equity brought by the patentee of an improvement in caisson gates against officers of the United States, who were using in their official capacity at a dry dock in a navy yard a caisson gate made and used by the United States in infringement of his patent, the plaintiff is not entitled to an injunction. Nor can he recover profits if the only profit proved is a saving to the United States in the cost of the gate.

The case of Fitts v. McGhee, in which the decision was rendered by Justice Harlan himself, gave an excellent opportunity for him to express by way of dictum what he seemed so much to desire should become law. The question was the validity of a statute of Alabama which established a maximum rate of tolls for a bridge across the Tennessee River. The owners of the bridge claimed that since this rate did not allow them reasonable compensation it took their property without due process of law. The United States circuit court took cognizance of the case, held that the act was unconstitutional, and issued an injunction against the officers of the State to prevent them from arresting the bridge officials. It was taken to the Supreme Court on the plea that such an injunction was a suit against the State within the meaning of the eleventh amendment.

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The decision was rendered, however, on the jurisdiction of the circuit court. Its decision was reversed on the ground that it had taken jurisdiction over something which should have been settled in the state courts and appealed, if necessary, by writ of error to the United States Supreme Court. In this case, however, is found the first clear statement of Justice Harlan's real opinion as to what should be the law regarding suits against officers of a State. It was quoted in his dissent from Ex parte Young and noted above, namely, that suits against officers, though for acts done in their official capacity, should be entertained if a definite damage had been averred under the statute supposed to be unconstitutional.

In Tindal v. Wesley Justice Harlan was also called upon to deliver the opinion of the court. This case was to test the legality of the title to certain land held in South Carolina in the name of the State. The defendants, officers of the State, seem to have got possession of it by paying for it with a kind of paper issue which was practically worthless. The possession of the land by the State of South Carolina corresponded very significantly to the possession of the Lee estate by the United States, in that the rightful owners had not been duly paid for their property. In this case Justice Harlan extended to the States the principle set forth in the Lee case. He referred largely to the latter decision. In the case of Tindal v. Wesley is seen a comparatively recent decision in which a suit against officers of a State in their official capacity was entertained and decided against them.

The next and last case in this connection is that of the International Postal Supply Co. v. Bruce. The decision in this case was brief and concise, but the dissent was lengthy. Justice Holmes rendered the decision. Justice Harlan dissented. His dissent held the same contention, but it showed some new features. He said at the outset: "The United States is not here sued, although, as in *United States* v. *Lee*, it may be incidentally affected by the result. No decree is asked against it. The suit is against Dwight H. Bruce, who

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is proceeding in violation of the plaintiff's right of property, and denies the power of any court to interfere with him, solely upon the ground that what he is doing is under the order and sanction of the Postoffice Department. He is, so to speak, in the possession of, and wrongfully using, the plaintiff's patented invention, and denies the right of any court, by its mandatory order, to prevent him from continuing in his lawless invasion of a right granted by the Constitution and laws of the United States."

This suit was brought against the postmaster by the owner of letters patent on a machine for canceling and postmarking. Its purpose was to restrain this postmaster from using such infringing machines, which had been hired from the manufacturer by the Postoffice Department for a term not yet expired. The gist of the argument for the court appears in the following sentences: "In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has a property,—a right *in rem*,—in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. This right cannot be interfered with behind its back; and, as it cannot be made a party, this suit, like that of *Belknap* v. *Schild*, must fail. The answer to the question certified must be 'No.' Whether or not a renewal of the lease could be enjoined is not before us."

It appears, then, that it was not the fact that the decision was against the patentee which aroused Justice Harlan's ire, but it was the precedent which the peculiar wording of the decision seemed to set. He could not justify in his mind the infringement on the part of the United States of a patentee's rights. It was this precedent which he was citing when he said: "I am of opinion that every officer of the government, however high his position, may be prevented by injunction, operating directly upon him, from illegally injuring or destroying the property rights of the

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citizen; and this relief should more readily be given when the government itself cannot be made a party of record." Yet the decision seems to hold that the government may use patented articles regardless of the rights of the patentee, because of the fact that there is no way to stay the action of the government by enjoining the officer. It must be added that by an act of 1910 Congress has provided that such persons may appeal to the court of claims and get compensation. But this provision, of course, does not give full relief because it is necessary that a large amount of money be involved in order to get a case into that court. Nevertheless the government, if not the court, has to that extent come to accept Justice Harlan's doctrine.

Justice Harlan's Doctrine of Suability.—There seem to be mainly three grounds upon which an attempt is made to justify the theory of non-suability. The strongest has been aptly stated by Justice Miller in United States v. Lee: "It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself in those courts." This principle is given the most prominent place in a discussion of the development of the theory of non-suability of States in the United States.[1]

But it seems that this contention may be open to some objections, at least from Justice Harlan's standpoint. In fact, it may even be questioned whether this contention in essence conflicts with his theory of suability. To answer that necessitates a clear analysis of the meaning of terms. What is meant when it is said that the courts are the creation of the supreme power? What is meant by the supreme power? These questions, of course, have been discussed fully by students of political science generally. The con-

[1] K. Singewald, "The Doctrine of Non-suability of the State in the United States," in Johns Hopkins Studies, series xxviii, no. 3, p. 10.

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sensus of opinion seems to be that this supreme power is the will of the people. This will is usually expressed in a convention which forms a constitution, and this constitution gives the courts their jurisdiction, or at least outlines the position which they are to occupy in the government. Does, then, a suit against an officer in his official capacity necessarily imply the bringing of this supreme power before a court for trial? The supreme power is the constitution. This constitution allows the legislature to make laws along certain lines. It also allows the courts to interpret these laws and to determine whether the laws made are along the line of the constitution. Why, then, should not the court, which is duly designated as the final arbiter of the constitutionality of laws, summon officers of the State and cause them to show that any law that involves the functionaries of the State is in accordance with the constitution? Why should it not make them justify their actions? Why should it be considered legal for the State to allow its officers to act in a way as regards itself and the citizens of the State that would be pronounced wrong as regards the citizens in their relations to each other? How are we going to know that such an act is in accordance with the will of the State unless it can be proved? In other words, how can we say that such an action is in reality an expression of the will of that supreme power until all of the organs of the supreme power, designated by it to have a say in the matter, have either tacitly or expressly given their assent?

The second contention was voiced by Justice Gray in Briggs v. Light-Boat, 11 Allen 157, as follows: "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and

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means of carrying on his government in war and in peace, and the money in his treasury."[2]

This assertion means that shutting out a whole class of cases would necessarily reduce the number of suits to be tried. But it also means a little more than that. It means that there would be shut out a particularly disturbing class, one that might make the government falter in the performance of its duties. But is this assumption valid? The answer must be that it is not. As the cases discussed have shown, the court has not succeeded sufficiently well in defining that class of cases to shut it out. As a matter of fact, it has aggravated the situation by allowing certain suits against officers in their official capacity, while refusing relief to others with an equally good claim to be heard. This uncertainty in the law has tended to increase the number of unconstitutional statutes passed. With this increase and with the uncertainty of the law has come the tendency to bring additional suits, and the situation has been made worse. If it were recognized once for all that officers may be sued, this tendency toward the passage of unconstitutional legislation would naturally be checked, and thus the number of suits testing this legislation would tend to lessen.

An additional very logical objection is made by Justice Holmes in Kawananakoa v. Polyblank, 205 U. S. 349: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

This objection sounds convincing, but a careful examination may reveal faulty premises. There is little reason why there could not be legal action against officers of States. In fact, it is practiced to no small extent on the continent of Europe. The one thing for which our nation stands is the submission of everybody to law. Why then should it be legal for officers of the government to commit acts in behalf of the state which are recognized as wrong for

[2] Singewald, p. 10.

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individuals? Does not the fact that the supreme power has said that certain things are wrong between man and man imply that those things are wrong between the government and the citizens?

Moreover, concerning the ability of the court to enforce its decree upon the officers in question, it is only necessary to say that decrees seldom need to be enforced by compulsion,—except those of a criminal nature, and these are not in question here. A case would hardly rise which would require violence in enforcement, involving the interpretation of the Constitution. But even if it did, it is certain that no court would be foolish enough to entertain a suit against an officer whose consent was needed to enforce its decree. There will usually be a way around this, and there is no reason why the court should not go as far as it can in this regard, instead of pronouncing, at every little pretense, that an action against an officer is a suit against the State. Such an interpretation would almost certainly center public opinion more strongly upon the Constitution, and would tend to purify the fundamental law. The case of United States v. Lee seems to be a wise decision and to establish a worthy precedent.

A further objection might also be urged, namely, that such a doctrine as that for which Justice Harlan stood might intimidate officers. If this doctrine were recognized as constitutional, they might hesitate to enforce the laws for fear that the laws might be declared unconstitutional. This objection could hardly hold, for two reasons: In the first place, the officers would certainly not be individually responsible for acts done at the direction of the State. Since, then, their personal responsibility would be no greater, their refusal to obey would be useless. In the second place, the court can by mandamus force an officer to perform ministerial functions.

Viewing the subject in the light of the above reasons, there appear to be no grounds for real objection to Justice

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Harlan's contention that a suit against an officer to prevent him from enforcing against an individual a definite provision of a law should be maintained in all cases in order to test the constitutionality of the law under which the action is taken. As a result of such an interpretation of the eleventh amendment the number of cases which would arise on account of the uncertainty of the law would almost certainly be lessened, as there would be less danger that a State would try to cover unconstitutional legislation under the plea of the non-suability of States. There is little reason why a State should allow its officers to commit acts which are considered wrong for its citizens to commit.

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CHAPTER II

Impairment of the Obligation of Contracts

Since the question of the suability of States is so closely related to that of the obligation of contracts, it is natural that this subject should be considered next. Some of this discussion will be derived from cases which have been alluded to in the previous chapter, but whereas in that chapter the concern was with the suability phase, it is now with the contract phase.

The Constitution of the United States has two clauses which might prohibit a State from impairing the obligation of contracts. The first is the express provision, in article i, section 10, that no State shall pass any "law impairing the obligation of contracts"; the second provision is that portion of the fourteenth amendment which reads that no State shall deprive "any person of life, liberty or property, without due process of law." Either of these stipulations might have the meaning desired, but since there is the express prohibition in the original draft of the Constitution, the second has, of course, no great importance here.

The Relation of a State to its Contracts.—This question has already been somewhat discussed in the consideration of the suability of States. It will now be developed more fully.

The Supreme Court has decided that the acts of the States during the Civil War should, for the most part, be valid, except in so far as they were directly in aid of the rebellion. Whereas the court has tried to make this ruling as extensive as possible, Justice Harlan has, at times, stood for a somewhat narrower doctrine. The case of Keith v. Clark, 97 U. S. 454, illustrates this point. Here the court decided that notes issued by the Bank of Tennessee in the

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year 1861, after the outbreak of the Civil War, should be received in payment of taxes. The facts of the case were these: In 1838 the State had stipulated in the charter of the bank that the notes of the bank should be received in payment of taxes. Subsequent to the war a man tendered forty dollars of these notes, issued during the war while the State was a member of the Confederacy. The question, therefore, was, did the refusal of the tax-collector, on authority of a state act, to accept the notes of the Bank of Tennessee issued while the State was in rebellion constitute an impairment of the obligation of contracts; or, better, was the act which authorized that refusal an impairment of the obligation of contracts, since the State had, when the bank was chartered, agreed to accept its notes for taxes? The court said that such a statute did not impair the obligation of contracts, and that the notes should have been accepted for taxes.

The reasons for the holding of the court were three: First, the State of Tennessee had never legally been out of the Union, and hence its acts during the war had to be reckoned with. Second, in spite of the fact that the States had so far succeeded in separating themselves from the Union as to establish usurping governments, yet even those governments could not be entirely overlooked; their acts should be accepted as far as could be done. A contrary doctrine, it was claimed, would be opposed to the powers inherent in every organized society. Third, since the record did not show that the notes had been issued in aid of rebellion, they ought to be considered as not having been issued for that purpose.

The ground upon which Justice Harlan rested his dissent was that the duly recognized State was not legally bound to accept acts which had been passed under usurping authority. Since the notes issued at this time were of little value, there was no reason for declaring the particular act invalid which forbade the acceptance of the notes. "They were," he said, "the obligations of an institution controlled

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and managed by a revolutionary usurping State Government, in its name, for its benefit, and to prevent the restoration of the lawful government. It was the revolutionary government which undertook to withdraw the State of Tennessee from its allegiance to the Federal Government and make it one of the Confederate States. When, therefore, the people of Tennessee, who recognized the authority of the United States, assembled in delegate convention, in January, 1865, it was quite natural and, in my judgment, not in violation of the Federal Constitution" for them to declare invalid bonds, notes, and so on, issued under the usurping government.

"There is some difficulty in defining precisely what Acts of the usurping State Government the restored State Government should have recognized as valid and binding. It may be true that there were some of them which should, upon grounds of public policy, have been recognized by the lawful government as valid and binding. It may be that the courts, in absence of any declaration to the contrary by the lawful government, should recognize certain Acts of the revolutionary government as *prima facie* valid. But I am unwilling to give my assent to the doctrine that the Constitution of the United States imposed upon the lawful Government of Tennessee an obligation, which this court must enforce, to cripple its own revenue, by receiving for its taxes bank-notes issued and used, under the authority of the usurping government, for the double purpose of maintaining itself and defeating the restoration of the lawful government in its proper relations in the Union."

Hence, though Justice Harlan would have recognized certain of the acts of the revolutionary governments as valid, he would have drawn a much stricter line than did the court. Above all, he would not have recognized the validity of acts which the reinstated government had attempted to make invalid, at least to such an extent as to make the government take depreciated money for taxes, for this in itself would have meant that the usurping govern-

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ment, even after the war, was working toward the weakening of the recognized legal government. He would have been less liberal in this regard, and would not have counteracted legislation which enabled the State to obtain valid money for its taxes, when there was sufficient reason for declaring constitutional the act which imposed this requirement.

Though the courts have been careful not to uphold laws impairing the obligation of contracts among individuals, they have not been so particular to see that a State should not impair its own contracts. As has been seen, they have usually succeeded in getting out of this situation by asserting the suits to be against the States. As was brought out in the first chapter, the case of Louisiana v. Jumel, 107 U. S. 711, well illustrated this point. Here no one questioned the fact that an amendment to the state constitution had impaired the obligation of contracts. The only question was whether any remedy at law could be found whereby this impairment could be thwarted. The court decided that since a suit could not be entertained against officers of a State in their official capacity, there was no remedy. As was pointed out, however, the courts have been irresolute in holding to this doctrine, while Justice Harlan was very resolute in opposing it. According to him, the contract of a State was even more sacred than that of a person, and the plea that the suit was against the State should not permit a State to violate the contract clause. As he argued in his dissent from Louisiana v. Jumel, he has argued even more vigorously in other cases.

The case of Antoni v. Greenhow, 107 U. S. 769, illustrates this, and is typical of the success of a State in repudiating its debt through indirect methods. In 1871 Virginia passed a law providing for a bond issue in order to float her public debt. In this act it was provided, among other things, that the interest coupons of the bonds should be receivable for taxes, and that if the collector should refuse to accept them in payment of taxes he could be forced by mandamus to do

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so. In 1882 an act was passed which purported to counteract an accumulation of fraudulent coupons. It provided that no coupons should be accepted for taxes, and that all taxes must be paid in currency. If anyone, however, should tender interest coupons, they could be received and the question as to their genuineness be submitted to a jury. If they were held to be genuine, the money paid would be refunded. The question, then, was whether this act of 1882 impaired the obligation of contracts, and whether it was therefore unconstitutional. The court said no. So long as the coupons were still receivable for taxes the obligation was not impaired, and the method of receiving them was immaterial. In short, the change in remedy for non-acceptance from mandamus to jury trial did not mean an impairment of the obligation of contracts.

This decision did not meet with the approval of Justice Harlan. He contended that a change in remedy which imposed new and burdensome conditions upon the coupon holders to such an extent as to make the coupons in fact valueless in their hands was necessarily an impairment of the obligation which they evidenced. The former act had made the coupons receivable for taxes, and had arranged for their acceptance to be enforced; the second act had granted that the coupons were receivable, but had made it impossible for the holders to have them accepted without going to greater expense than the value of the coupons.

In answer to the argument that counterfeit coupons might be presented, he said that if the collector did not know certain coupons to be valid there were sufficient means of verification. All that the tax collector had to do was to refuse them, and when the holder applied for a mandamus to force their acceptance there was opportunity to have the coupons tested. The act of 1882, therefore, was neither expedient nor constitutional, and could not obtain his assent.

Following upon Antoni v. Greenhow was the case of Ex parte Ayers, 123 U. S. 443. The State of Virginia had

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found it necessary to pass even more stringent laws to prevent the taxpayers from forcing their claims. An English brokerage establishment had bought $100,000 worth of those coupons, in London, buying them for about $30,000, for the purpose of selling them to the taxpayers of Virginia, of course at an increase upon cost, but at a price below face value. To meet this move, the State, by statute, established additional restrictions to be complied with before the coupons could be accepted for taxes,—acts passed, of course, under the guise of means to detect counterfeit coupons. There were two chief characteristics of these laws: First, in order to make the coupon receivable the one who owned it had to be able to present the original bond from which it was cut; secondly, no expert evidence was allowed in the court to verify the coupons, that is, no attorney could be employed. Thus by the various acts in question the State had forced the taxpayers "into a lawsuit in her own courts, in which she has taken effectual precaution beforehand to make it impossible they can win." Such legislation the plaintiffs contended to be an impairment of the obligation of the State's contracts. Pressed to the wall by this contention, the officers of the State pleaded that the suit against them was a suit against the State and hence could not be maintained. This the United States Supreme Court held to be the case.

Justice Harlan, of course, did not approve this decision any more than he had approved that of Antoni v. Greenhow. He said: "The commonwealth of Virginia has no more authority to enact statutes impairing the obligation of her contracts than statutes impairing the obligation of contracts exclusively between individuals. . . . A statute which is void, as impairing the obligation of the State's contract, affords no justification to anyone, and confers no authority. If an officer proposes to enforce such a statute against a party, the obligation of whose contract is sought to be impaired, the latter, in my judgment, may proceed, by suit, against such officer, and thereby obtain protection in his

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rights of contract, as against the proposed action of that officer. A contrary view enables the State to use her immunity from suit to effect what the Constitution of the United States forbids her from doing; namely, to enact statutes impairing the obligation of contracts."

Another case wherein Justice Harlan differed from the court in its interpretation of the contract clause in the Constitution of the United States is that of Louisiana v. Mayor, etc., of New Orleans, 109 U. S. 285. This case was long and much involved. It will be treated again under due process of law, but the matter of contract was discussed by both Justice Harlan and the court.

The State of Louisiana had passed a law making the county or town in which property had been destroyed by mob violence responsible for the value of such property destroyed. The State had by a later statute forbidden cities to levy taxes above a certain percentage. Private property of a considerable amount had been destroyed in New Orleans by mob violence. The party whose property had been destroyed brought suit against the city of New Orleans for the value of the property destroyed, and obtained judgment for the amount. The city refused to pay the judgment, asserting that within the bounds of the percentage allowed under the subsequent statute of the State she had collected all the money collectable and had no funds with which to pay the judgment. The question was, did the subsequent law of Louisiana, which held the city within certain limits in making assessments, amount to an impairment of the obligation of contracts, in that it deprived citizens of what had been guaranteed to them by the previous law? The court said that it did not, but Justice Harlan said that it did. His contention, however, was more vigorous on the point of due process of law than on that of contract, although the court dwelt mainly upon the contract feature. It must be admitted that this would have been a rather far-fetched interpretation of the word contract. But here, as in the above cases, Justice Harlan seemed to feel that the

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city was, by means of a technicality, slipping out of an obligation imposed upon it by the State. This sort of dishonesty always aroused his indignation.

Of the general ability of a State to impair contract clauses in charters seemingly permanent in their scope there is one very interesting case, Stone v. Farmers' Loan and Trust Co., 116 U. S. 307. It was brought from the United States circuit court for the southern district of Mississippi in order to test the validity of a state statute establishing a railroad commission to examine and pass upon tariffs and other railroad regulations. In chartering the railroad company the State of Mississippi embodied the following stipulation in its charter: "That the president and directors be and they are hereby authorized to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure." The contention of the railroad company was that the statute establishing a commission to regulate the tariffs was an impairment of the obligation of contracts in that it took from the company the power granted in the original charter to fix its own rates.

The import of the decision amounted to this: The fact that the railroad company had been granted the right to fix rates did not imply that the State might not also exercise that power. Since the State was not forbidden by the contract to fix rates, the establishment of a commission for that purpose did not impair the obligation of contracts. It implied that though the company might fix any rate it pleased, the commission could also do so, and that the latter rate was the only one that could be enforced in the courts.

Justice Harlan thought differently. He contended that the statute in question did constitute an impairment of the obligation of contracts and was void. He held, however, that the railroad company could not establish any rate it pleased to establish, but that rates established by the railroad company should hold unless declared unreasonable by

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some competent court. He said: "I am of opinion that this statute impairs the obligation of the contract which the State made with these companies, in this: that it takes from each of them the power conferred by its charter, of fixing and regulating rates for transportation within the limit of reasonableness; and confers upon a commission authority to establish, from time to time, such rates as will give a fair and just return on the *value* of such railroad, its appurtenances and equipments, and as experience and business operations may show to be just. In short, the companies are placed by the statute in the same condition they would occupy if their charter had not conferred upon them the power to fix and regulate rates for transportation. The whole subject of transportation rates is thus remitted to the judgment of commissioners who have no pecuniary interest whatever in the management of these vast properties, and who, if they had any such interest, would be disqualified under the statute from serving; and who are required to fix rates, according to the value of the property, without any reference to what it originally cost or what it had cost to maintain it in fit condition for public use. . . .

"In expressing the foregoing views I would not be understood as denying the power of the State to establish a Railroad Commission, or to enforce regulations (not inconsistent with the essential charter rights of the companies) in reference to the general conduct of their merely local business. My only purpose is to express the conviction that each of these companies has a contract with the State, whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as they deem proper; such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable."

Justice Harlan's contention in this case is not inconsistent, as may be thought, with some of his later dissents

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regarding the power of the Interstate Commerce Commission. He impliedly recognized here that the State may establish a commission of this kind without unconstitutional delegation of the legislative power, an assertion which he made more vigorously in his dissent from Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144. Neither was his doctrine as inexpedient as might be thought. He wished to have the State keep its word, and at the same time give the railroads to understand that their rates must be in accordance with reason. Yet it must be admitted that from the point of view of facility in the regulation of railroad rates the decision of the court was wiser.[1]

From the cases discussed may be deduced Justice Harlan's doctrine regarding the relation of a State to its own contract. It was merely this: that a State could, constitutionally, no more impair its own contracts than it could impair any other contracts; and that necessary proceedings should have been taken to prevent the States from impairing their own contracts.

Relation of the National Government to its Contracts.— As is well known, there is no constitutional limitation directly forbidding the United States to pass laws impairing the obligation of contracts. Though the national government has not been very careful not to impair the obligation of contracts, yet, when suits have been brought on this question, the court has argued that the action was not an impairment.

Justice Harlan held that, though there was no express statement to that effect in the Constitution, the stipulations

[1] With regard to land grants there is one case, and in that the difference was rather technical, involving the interpretation of the meaning of the terms of the contract. This was the case of Walsh v. Preston, 109 U. S. 297. The court decided that if a State grants land on contract, and if within good time the party to whom the land was granted cannot show that he has complied with the contract, the land is subject to regrantal. Justice Harlan differed from the court in that he contended that the party to whom the land was granted had given sufficient evidence of having complied with his part of the contract, and that the State had impaired the obligation of its contract in regranting any part of the land.

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that property should not be taken without due process of law, and particularly that private property should not be taken without just compensation, implied that the obligation of contracts could not be impaired. This question came up particularly in the cases involving the rights of patentees. There are three cases of special interest: Schillinger v. United States, 155 U. S. 163; Belknap v. Schild, 161 U. S. 10; and International Postal Supply Co. v. Bruce, 194 U. S. 601. These have been alluded to in the preceding chapter, but may be considered here in their relation to contracts.

The first of these cases came before the Supreme Court on the plea that a paving company, employed by the government at Washington, had used a patented process in employing tarred paper to keep cement blocks apart, and had thus impaired an implied contract right of the patentee to the exclusive use of his patented invention. The court decided that this use did not constitute an impairment of the obligation of contracts and that it was not a contract relation, but that the injury alleged was in the nature of a tort, and no action could be had against the United States for it. "So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretence of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort."

Justice Harlan, however, thought otherwise. With him, the United States government, in granting patents, formed contracts which it could not impair any more than could a state impair the obligation of its contracts. Some quotations will illustrate this point. "It may, therefore, be regarded as settled that the government may be sued in the Court of Claims, as upon implied contract, not only for the value of specific property taken for public use by an officer acting under the authority of the government, even if the taking was originally without the consent of the owner and without

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legal proceedings for condemnation, but for the value of the use of a patented invention when such use was with the consent of the patentee. . . .

"If Schillinger's patent was valid, then the government is bound by an obligation of the highest character to compensate him for the use of his invention, and its use by the government cannot be said to arise out of mere tort, at least when its representative did not himself dispute, nor assume to decide, the validity of the patent. If the Act of Congress under which the architect proceeded had, in express terms, directed him to use Schillinger's invention in any pavement laid down in the public grounds, then such use, according to the decision in *United States* v. *Great Falls Mfg. Co.*, would have made a case of implied contract based on the constitutional obligation to make just compensation for private property taken for public use. But such a case is not distinguishable, in principle, from the present one, where the architect, proceeding under a general authority to expend the public money according to specified plans, uses or knowingly permits to be used a particular patented invention, not disputing the rights of the patentee, but leaving the question of the validity of the patent, and the consequent liability of the government for its use, to judicial determination."

The case of Belknap v. Schild was sufficiently explained in the chapter on suability of States. In his dissent from this case Justice Harlan reiterated his arguments in Schillinger v. United States, but somewhat more vehemently: "If the United States may appropriate to public use the invention of a patentee, without his consent, and without liability to suit, as upon implied contract, for the value of the use of such invention; if, as the court holds, a public officer acting only in the interest of the public is not individually liable for gains, profits, and advantages that may accrue to the United States from such use; and if the officer who thus violates the rights of the patentee cannot be restrained by injunction,—then the government may well be

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regarded as organized robbery so far as the rights of patentees are concerned."

The details of the case of the International Postal Supply Co. v. Bruce have also been sufficiently explained. Here Justice Harlan, more vigorously than ever, reasserted the convictions expressed in the former dissents: "It is now adjudged that, although a postmaster may be confessedly proceeding in direct violation of the legal rights of the patentee, the court cannot, by any direct process, stop him in his destruction of the patentee's right of property. Under the present decision, the Postoffice Department not only may use, without compensation, the particular postmarking machines in question here, but it can lease others, and continue its violation of the patentee's rights at its discretion, thereby making the exclusive use granted by the patent of no value whatever."

From these opinions it is seen that, though there is no express prohibition upon the United States forbidding the impairment of the obligation of contracts, yet, according to Justice Harlan's doctrine, the prohibitions as to taking private property without just compensation and without due process of law would have worked to that end. But his doctrine did not prevail, and as the decisions now stand, the United States may impair the obligation of what in substance would appear to be contracts.

The Relation of a Foreign Government to Contracts.— Justice Harlan held also that a foreign government could not pass laws which the United States need recognize by international comity. This theory is brought out in his dissent in Canada Southern R. Co. v. Gebhard, 109 U. S. 527. A railroad company chartered in Canada had, in 1871, made a bond issue which was to pay seven per cent interest, to be collected in New York, the bonds to mature in 1906. In 1873 the company found it impossible to pay the interest on the coupons, and made a new issue of bonds, stipulating that the principal and interest should be paid within a short time, also in New York, thus making possible the payment

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of interest on the coupons of the former issue. Upon the maturity of the second bond issue the company was unable to meet its obligations. To remedy the situation the Parliament of Canada passed a statute providing for the surrender of the old bonds, bearing seven per cent interest, and the substitution of other bonds, maturing at a later date, and bearing a less rate of interest. The case was fought out in the United States circuit court, where the decision was that such a statute was an impairment of the obligation of contracts, and a judgment was issued against the railroad company. Upon appeal to the Supreme Court, the decision of the lower court was reversed. The reasons for the decree of the court were these: In the first place, the statute of Canada was in the nature of bankruptcy or foreclosure proceedings, and was not different in purpose from similar proceedings here; and, in the second place, international comity made it necessary that the United States recognize the validity of the act of the Canadian Parliament.

Neither of these contentions met with Justice Harlan's approval. He claimed that the proceeding was significantly different from bankruptcy or foreclosure proceedings in that the creditors had not been allowed their day in court. "It is unlike a composition in bankruptcy in this: that whereas a composition is never had except upon notice, so that creditors may have their day in court, with opportunity to show that the proposed composition should not be made, here, no such opportunity was given to the holders of this company's bonds, in any court or other tribunal, to show that the arrangement which the Canadian Parliament sanctioned ought not, in justice, to be made; but the arrangement was, by legislative enactment, made absolutely binding upon every bondholder and stockholder, even those who are citizens of other countries." To the second contention he objected that it was not fair to allow Canada to deny to American citizens what the American government could deny neither to them nor to citizens of Canada. "In this country, no State can

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pass any law impairing the obligation of contracts; the Constitution of the United States forbids such legislation. And the principle is founded in justice, independently of this constitutional provision. . . . A citizen of Canada, or even a railway corporation of that Dominion, could have the benefit, in our courts, of the constitutional inhibition upon state laws impairing the obligation of contracts."

The conclusion is as follows: "As I do not think that a foreign railway corporation is entitled, upon principles of international comity, to have the benefit, in our courts—to the prejudice of our own people and in violation of their contract and property rights—of a foreign statute which could not be sustained had it been enacted by Congress or by any one of the United States, with reference to the negotiable securities of an American railway corporation; and as I do not agree that an American court should accord to a foreign railway corporation the privilege of repudiating its contract obligations to American citizens, when it must deny any such privilege, under like circumstances, to our own railway corporations, I dissent from the opinion and judgment of the court."

It is seen, therefore, that according to Justice Harlan's doctrine the United States need not recognize that a foreign government has any more right to pass laws impairing the obligation of contracts of American citizens than has the home government.

To sum up Justice Harlan's doctrine of the obligation of contracts: He believed that the enforcement of valid contracts was a right to which all people were entitled and that the right lay deeper than any express command or limitation, being founded in abstract justice. Holding this view, he would not give his assent to any state law that impaired the obligation of contracts, and he thought that the necessary proceedings should always have been taken to prevent any impairment of state contracts, whether in regard to the State's own contracts or those of private citizens. Moreover, he contended with equal vigor that there was just as

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sacred a duty on the part of the United States not to impair in any way the obligation of legal contracts. Furthermore, he thought that the courts of the United States should always pronounce against the recognition of the right of any foreign government to impair contracts of the citizens of the United States, in the same way in which they would or should oppose such impairment here.

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CHAPTER III

Due Process of Law

Just as it is practically impossible to get an exact and final definition of the expression "due process of law" to fit the general study of constitutional law, so it is difficult to state positively what any one person has conceived it to be. Justice Harlan has in several places set forth decided opinions as to this conception. As he was inclined to be strongly nationalistic in his tendencies, one would suppose that he would have wanted to give it a broader interpretation than the court as a whole has found it fitting to do. This, however, is not entirely true. In some respects he did wish to make the meaning broader than the court had decided, but in the majority of cases his view was a more limited one.

Before taking up the various instances in which he has differed from the court and in which his decided convictions on this subject will be in the foreground, some quotations illustrative of his general doctrine will be given.

In his dissent from Hurtado v. California, 110 U. S. 516, he gives the following quotation from a former decision[1] as expressing his opinion: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles are

[1] Murray v. Land and Improvement Co., 18 How. 272.

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we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*"

According to this opinion, to ascertain whether any legislation or any governmental act of any kind is contrary to the prohibition in the Constitution as to due process of law, two questions must be asked: First, is there any other provision in the Constitution which forbids it? If so, it is, of course, not due process of law. Secondly, do the customs and practices of English law forbid? If so, it is not due process. Though the first criterion is definite, the second may give rise to much dispute. According to Justice Harlan, however, these criteria furnish safe guides in ascertaining whether any act is constitutional within the meaning of that clause of the fourteenth amendment.

A quotation from Justice Harlan's dissent in the Hurtado case will show his position: "'Due process of law,' within the meaning of the national constitution, does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government. If particular proceedings conducted under the authority of the general government, and involving life, are prohibited, because not constituting that due process of law required by the 5th Amendment of the Constitution of the United States, similar proceedings, conducted under the authority of a State, must be deemed illegal as not being due process of law within the meaning of the 14th Amendment." As will be shown presently, the court has not held to this view. But it is a strange sort of interpretation, according to Justice Harlan, which explains due process

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differently for two different spheres of government under the same constitution.

Another quotation, from Justice Harlan's dissent from Taylor v. Beckham, 178 U. S. 548, will be appropriate here: "The liberty of which the 14th Amendment forbids a state from depriving anyone without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words 'life, liberty, or property' in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.'"

Life and Liberty.—The question of deprivation of life or liberty without due process of law involves mainly the matter of criminal procedure. In fact, Justice Harlan's doctrine appears most clearly in his dissents from cases involving trial by jury,—cases in which trial by jury has been limited. The first and chief case on this subject was that of Hurtado v. California, 110 U. S. 516.

This case involved an indictment without grand jury of a person who was accused of murder. The case was taken to the Supmere Court of the United States, on the ground that the statute of California which allowed such a procedure was unconstitutional in that it deprived the criminal of his life without due process of law. The question for the court to decide, then, was whether denial of indictment by grand jury constituted a denial of due process of law.

The decision in this case was delivered by Justice Matthews, and his arguments may be summarized as follows: (1) Referring to the test for due process of law as given in Murray v. Land and Improvement Co., quoted above, he said that this is not the only test for due process of law. "This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

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"But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. . . . But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." This declaration is reenforced with the statement that such a principle might require trial by ordeal. (2) Since the words "due process of law" were used in the fifth amendment in connection with the constitutional guarantee of trial by jury, and in the fourteenth without this guarantee, it may be taken that this omission gives room for allowing the States to abandon jury trials. "If in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the 5th Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

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It is seen that the contention of the court was that the institution in cases of felonies of a procedure other than jury trial did not abridge a right guaranteed by the Constitution because, in the first place, due process of law might mean more than had been previously recognized as proper procedure, otherwise progress in criminal procedure would be thwarted. In the second place, since the provision regarding due process of law as given in the fourteenth amendment was inserted without a special stipulation regarding jury trial, it could not be taken to mean that trial by jury was necessary. Then follows this definition of due process of law: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

These contentions did not meet Justice Harlan's approval. In answer to the first argument of the court he showed that usage and custom both in England and in the United States required that criminal cases be tried only by a jury. In addition to the fact that this requirement had been made in the Constitution of the United States, it had been made in the constitution of practically every State. A custom which had received such sanction was not to be lightly brushed aside as a relic of barbarism. In other words, it was so predominant a characteristic as to require a constitutional amendment before it could be done away with anywhere in the United States.

In answer to the second contention of the court the following argument was made by Justice Harlan: "This line of argument, it seems to me, would lead to results which are inconsistent with the vital principles of republican government. If the presence in the 5th Amendment of a specific provision for grand juries in capital cases, alongside the provision for due process of law in proceedings involving life, liberty or property, is held to prove that due process

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of law did not, in the judgment of the framers of the Constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be, likewise, held that the right not to be put twice in jeopardy of life and limb for the same offense, nor compelled in a criminal case to testify against one's self (rights and immunities also specifically recognized in the 5th Amendment) were not protected by that due process of law required by the settled usages and proceedings existing under the common and statute law of England at the settlement of this country. More than that, other Amendments of the Constitution proposed at the same time, expressly recognize the right of persons to just compensation for private property taken for public use; their right, when accused of crime, to be informed of the nature and cause of the accusation against them, and to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed; to be confronted by the witnesses against them; and to have compulsory process for obtaining witnesses in their favor. . . . If the argument of my brethren be sound, those rights (although universally recognized at the establishment of our institutions as secured by that due process of law which for centuries had been the foundation of Anglo-Saxon liberty) were not deemed by our fathers as essential in the due process of law prescribed by our Constitution; because—such seems to be the argument—had they been regarded as involved in due process of law, they would not have been specifically and expressly provided for, but left to the protection given by the general clause forbidding the deprivation of life, liberty or property without due process of law. . . .

"So that the court, in this case, while conceding that the requirement of due process of law protects the fundamental principles of liberty and justice, adjudges, in effect, that an immunity or right, recognized at the common law to be essential to personal security, jealously guarded by our National Constitution against violation by any tribunal or

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body exercising authority under the General Government, and expressly or impliedly recognized, *when the 14th Amendment was adopted,* in the Bill of Rights or Constitution of every State in the Union, is yet, not a fundamental principle in governments established, as those of the States of the Union are, to secure to the citizen liberty and justice and, therefore, is not involved in that due process of law required in proceedings conducted under the sanction of a State."[2]

The case of Hurtado v. California seems to be the most significant case in which there is an answer to the question as to the relation of due process of law to trial by jury. There is no express constitutional stipulation that a State shall not deprive persons of the right of trial by jury; hence, if a State does enact a law which denies this right to its citizens, the only constitutional stipulation under which the law may be tested by the Supreme Court of the United States is that in the fourteenth amendment which says that life, liberty, or property shall not be denied by a State to any person without due process of law. When the question as to the denial of the right of trial by jury has been contested under the laws of the United States proper, the plaintiffs have preferred to bring up the cases under the express limitation upon the United States that jury trial shall not be denied.

The cases of Hawaii v. Mankichi, 190 U. S. 197, and Schick v. United States, 195 U. S. 65, are typical cases in this connection. The first will be discussed under the topic of judicial legislation[3] and in the comments upon the Insular Cases,[4] and may be omitted here. Although the case of Schick v. United States cannot be said to bear directly upon the question of due process of law, it can best be discussed here as illustrative of Justice Harlan's belief that

[2] See Thompson v. Utah, 170 U. S. 343, where Justice Harlan in rendering the majority opinion stated that criminal procedure must be by jury trial in all territories of the United States.

[3] See pages 197–198.

[4] See pages 185–188.

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trial by jury is a fundamental doctrine, and one not to be dealt with lightly, as the court has at times showed a tendency to do.

The question to be settled in this case was whether a man accused of crime could waive trial by jury. The plaintiffs in error had been prosecuted after a trial by information in a district court of the United States for violation of a national law which required that oleomargarine should be stamped in a certain way. The court held that since the fine could not exceed fifty dollars, this was a petty offense, and hence was not meant to be included within the third article, which states that "the trial of all crimes, except in cases of impeachment, shall be by jury." The argument was (1) that the clause did not necessarily embrace offenses like this one. In support of this assertion the court went into the history of the clause. The fact that the constitutional convention had changed the phrase "criminal procedure" to the word "crimes" argued in the mind of the court that the word crimes was meant to embrace only those of deeper significance. (2) If a man guilty of murder may, by pleading guilty and throwing himself upon the mercy of the court, do away with trial by jury, why could not one informed against for a petty offense waive the trial by jury?

In dissenting in this case Justice Harlan showed that the whole wording of the act went to show that all crimes were meant to be included within its scope, and that history did not bear out any other interpretation of the requirement in the Constitution that trial by jury should be always upheld. Since, therefore, every consideration went to show that the charge in question was a crime within the meaning of both the statute and the Constitution, the only legal mode of procedure was that of trial by jury. He thereupon proceeded to examine the bearing of history on that particular case, and found that nothing in the practices of English law justified the trial of such a case in any other way.

His answer to the contention of the court that the plain-

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tiff had a right to waive trial by jury is well worth quoting: "In this connection we are confronted with the broad statement, found in some adjudged cases as well as in elementary treatises, to the effect that a person is entitled to waive *any* constitutional right, of whatever nature, that he possesses, and thereby preclude himself from invoking the authority of the Constitution for the protection or enforcement of that right. It is suggested that even when charged with murder he may plead guilty, and that the court thereupon, without the intervention of a jury, may pronounce such judgment as the law permits or authorizes. And it is confidently asked by those who make that suggestion, Why may not one charged with a misdemeanor, and pleading not guilty, waive a jury altogether, and consent to be tried by the court? This argument will not stand the test of reason. It proceeds upon the ground that jurisdiction to try a criminal case may be given by consent of the accused and the prosecutor. But such consent could have no legal efficacy. Undoubtedly one accused of murder may plead guilty. But in doing so he renders a trial unnecessary. The Constitution does not prohibit an accused from pleading guilty. His right to do so was recognized long before the adoption of that instrument; and it was never supposed that such a plea impaired the force of the requirement that a trial for crime, under a plea of not guilty, shall be by jury. It is not to be assumed that the Constitution intended, when preserving the right of trial by jury, to change any essential rule of criminal practice established at the common law, before the adoption of the instrument. When the accused pleads guilty before a lawful tribunal he admits every material fact well averred in the indictment or information, and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment upon the facts voluntarily confessed by the accused. What the Constitution requires is that the *trial* of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity,

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be a trial; for by that plea he puts 'himself on his country, which country the jury are'; he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed; and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered."

Justice Harlan's answer to the contention of the court that a man may waive trial by jury is based upon the fact that he had not pleaded guilty. If he has pleaded guilty, of course, as Justice Harlan said, there will be no need for trial; the case is determined, and the only thing that remains to be done is to administer the penalty. In other words, the jury is to determine whether a man is guilty or innocent, when he pleads not guilty. This is the only method allowed by the Constitution. Justice Harlan's constitutional doctrine is that the only process of law by which a man may be deprived of his life or liberty is by complete jury trial, according to the customary meaning; and so long as the Constitution reads as it does, there is no other recourse, either for the government or for the accused.

Property.—The court has in many cases been called on to determine what is and what is not property, and has pronounced some things not to be property which Justice Harlan thought ought to be considered such; but it cannot be said that it has declared anything to be property which he thought ought not to be so considered. There are several interesting cases bearing on this point. The case of Louisiana v. Mayor, etc., of New Orleans, 109 U. S. 285, was an early one in Justice Harlan's experience.

The case involved a statute of Louisiana which made the locality in which mob violence had been the cause of destruction of property responsible for such destruction. The case has been explained in the chapter on the obligation of contracts.[5] A judgment having been secured against the city of New Orleans for property destroyed, the city re-

[5] See page 49.

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fused to make payment, on the ground that there were insufficient funds in the treasury, and that it was impossible, under the statute of Louisiana which limited the amount of assessment, to collect taxes to meet this obligation. The question was, did this later statute, which prohibited an assessment beyond a certain percentage, deprive the person who held the judgment of his property without due process of law? The court, speaking through Justice Field, did not answer this question exactly in the negative, but gave an answer which amounted to the same thing.

The discussion by the court of this point is very brief. Justice Harlan, however, in his dissent dwells on it at length. The court spoke as follows: "Conceding that the judgments, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city. Although the present limitation of the taxing power of the city may prevent the receipt of sufficient funds to pay the judgment, the Legislature of the State may, upon proper appeal, make other provisions for their satisfaction. The judgment may also perhaps be used by the relators or their assignees as offsets to demands of the city; at least it is possible that they may be available in various ways. Be this as it may, the relators have no such vested right in the taxing power of the city as to render its diminution by the State, to a degree affecting the present collection of their judgments, a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it."

This gives in full the bearing of the opinion upon the point of due process of law. The main part of the opinion is devoted to showing that the statute in question did not impair the obligation of contracts. The question of due process, which Justice Harlan thought ought to have de-

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termined the case for the plaintiffs, was therefore slurred over. It is seen that the argument was not that the judgments were not property, but that they were not property in the sense that their immediate collection could be forced.

The contention of the court on this point did not suit Justice Harlan. He knew that there were ulterior motives behind the plea of the city that there was no money in its treasury to meet these obligations. To him these judgments constituted a just debt which ought to be paid. He therefore undertook to prove that judgments are property, and that the statute was unconstitutional in that it deprived the owner of their enforcement. "Its value as property depends in every legal sense upon the remedies which the law gives to enforce its collection. To withhold from the citizen who has a judgment for money, the judicial means of enforcing its collection; or, what is, in effect, the same thing, to withdraw from the judgment debtor, a municipal corporation, the authority to levy taxes for its payment, is to destroy the value of the judgment as property. . . . If the property of the citizen is 'taken,' within the meaning of the Constitution, when its value is destroyed or permanently impaired through the act of the government, or by the acts of others under the sanction or authority of the government, it would seem that the citizen holding a judgment for money against a municipal corporation—which judgment is capable of enforcement by judicial proceedings at the time of its rendition—is deprived of his property without due process of law, if the State, by a subsequent law, so reduces the rate of taxation as to make it impossible for the corporation to satisfy such judgment. Since the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property."

In reply to the contention of the court that the judg-

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ments were still existing liabilities against the city, Justice Harlan said: "My answer is, that such liability on the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings."

Another case which involved a somewhat similar consideration came up from West Virginia. It was the case of Freeland v. Williams, 131 U. S. 405, and was a question of trespass which took place during the Civil War. Freeland while a soldier had taken cattle from Williams. Williams sued Freeland and received judgment. After this proceeding, a new constitution went into effect for West Virginia, a section of which relieved persons of such debts incurred during the Civil War. One of the questions was, did that section of the constitution of West Virginia which made it impossible for Williams to collect the money on his judgment take property without due process of law? The court, speaking through Justice Miller, said that it did not. Justice Harlan in his dissent said that it did.

In giving the reasons for its decision, the court spoke as follows: "Was it competent for that convention to establish a rule of law which is now the recognized rule of this court, and perhaps of all the courts of the United States, which is commended by the highest authorities, and which is eminently adapted to the purpose of quieting strife and securing repose after the turmoils of a civil war, although the principle asserted was in opposition to that held by the supreme court of appeals of the State? That this principle would govern all cases where the act for which the party was sued occurred after its establishment does not admit of question. That it was the law of the country before its adoption by the State constitution there is as little doubt. Shall it be held to be incapable of enforcement and forbidden by the Constitution of the United States because it is made to cover judgments already rendered in violation of the principle asserted? The Constitution of the State remedies the defects of the proceeding by bill in chancery; it creates no new process of law; it makes that which always

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has been due process of law efficient by removing objections and obstructions to its operation. It simply declares that a judgment for a wrong or tort, which in itself was erroneous, is a voidable judgment, and may be voided, if it can be brought within due process of law already existing, and shall by this means be inquired into, and if it is against right, justice, and law, shall be no longer in force, and the judgment plaintiff shall be forever enjoined from putting it into execution." Thus it is seen that the argument of the court amounts to saying that it is not unconstitutional for a State so to amend its constitution as to take property as long as the means through which that property is taken are not in conflict with a process of law which has become widely recognized as due process of law.

Justice Harlan could not accept that doctrine. In his dissent is found the following opinion: "If the taking of cattle was illegal, the right to recover from the wrong-doer their reasonable value was an absolute one, of which the owner could not be deprived by a legislative enactment of the State, or by an amendment of its Constitution. The judgment obtained by Freeland was an adjudication that the taking was illegal. He acquired by that judgment a vested right to have and demand the amount named in it, as well as the benefit of such remedies as the law gave for the enforcement of personal judgments for money. The judgment was, therefore, property of which the State could not deprive him, except by due process of law. And a constitutional provision, subsequently enacted, declaring that the defendant's property should not be seized or sold under final process on such judgment, is not due process of law. I cannot agree that a State may, by amendment of its fundamental law, prevent a citizen from recovering the value of property, of which, according to the final judgment of its own courts, he has been illegally deprived by a mere trespasser. That would be sheer spoliation under the forms of law. If the amendment in question had, in terms, given the defendant a right to a new trial, of the action of trespass

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in the same court, after the time had passed, within which, according to the settled modes of procedure, he could, of right, apply for a new trial, it would have accomplished, in respect to the judgment against him, precisely what, in effect, has been held by this court to be consistent with the Fourteenth Amendment. . . .

"The only possible ground upon which the judgment below can be sustained, consistently with the law of the land, is to hold that no court of any State had any jurisdiction in the year 1867, even with the parties before it, to inquire, in any action of trespass, whether an alleged taking of the private property of a citizen was a mere trespass, or was an act of war upon the part of the defendant, a Confederate soldier, and to give judgment according to the result of that inquiry."

From the above cases it may be deduced that Justice Harlan considered a judgment as property within the meaning of the Constitution of the United States, and held that any action taken by the State to render ineffective the collection of such judgment amounts to the taking of property without due process of law. It is true that the court did not hold that a judgment was not property, but it did hold that the action on the part of the State did not amount to the taking of property without due process of law. Since, however, the action of the State destroyed the value of the judgment in the hands of the owner, Justice Harlan contended that property had been taken. No doubt the court felt that a certain conclusion had to be reached, and that it was merely a matter of making the decision appear constitutional, or rather of seeming to justify an act as constitutional. Justice Harlan did not hold with such reasoning; with him the Constitution was too sacred for such twisting. The decision of the court may have been wise, but a contrary decision could certainly have done little to stir up any additional animosity.

The case of Backus v. Fort Street Union Depot Co., 169 U. S. 557, involved a somewhat complicated question of

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procedure. The contention between the court and Justice Harlan, however, was on the definite point of taking property without due process of law. The case came up from the supreme court of Michigan. The plea had been made that in a jury trial to determine what should be just compensation for property condemned for public use, just compensation had not been given because the judge had not properly charged the jury.

The condemnation was of a factory site, and the plaintiffs claimed that they should have had, in addition to the value of the property taken, the profits which they lost by changing the location of their factory, that is, during the time consumed by this change. The court said that the finding of the jury was due process of law, and that hence no property was unduly taken.

No particular argument needs to be noticed. The court said that it was due process, and Justice Harlan said that it was not. He concluded as follows: "Without referring to other matters discussed at the bar and in the elaborate brief of counsel, I place my dissent from the opinion and judgment of the court upon the ground that the trial court committed error in its charge to the jury as to the principles which should guide them in determining the just compensation to which the plantiffs in error were entitled." There was little question that the plaintiffs had not received full compensation for their property rights, and Justice Harlan doubtless appreciated that fact.

One of the most interesting and hotly contested cases that ever came up to the Supreme Court for determination of the meaning of property in connection with its seizure without due process of law was that of Taylor v. Beckham, 178 U. S. 548. This case came up from the Supreme Court of Kentucky, and involved the question of the election of the governor of that State. The facts in the case were briefly as follows: Taylor and Marshall were the Republican candidates for the governorship and lieutenant-governorship respectively of Kentucky. Goebel and Beckham were the

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Democratic candidates. According to the election returns, Taylor and Marshall, the Republican candidates, were elected. The Democratic candidates filed a protest and proceeded to contest the election. According to the constitution of the State, the method of settling a contested election is to select by lot a number of men from each house of the General Assembly, who are to investigate the election and report as to who was elected. This was done, and when the committee returned its decision, it was in favor of the Democrats. Soon thereafter Goebel was shot, supposedly by Taylor, or at his instigation. The fight was nevertheless continued by the candidate for the lieutenant-governorship, Beckham. The committee to investigate the election decided, seemingly without any formal investigation, that Goebel and Beckham had received the majority of the votes cast and were elected. But Taylor would not surrender the office to Beckham, whereupon the latter took the case into the state supreme court. There the decision was rendered in favor of Beckham. Taylor then carried his appeal to the Supreme Court of the United States, claiming that the action of the legislature in not making a fair investigation of the election returns, and of the supreme court of the State in rendering its decision against him, had deprived him of his property without due process of law. In connection with this claim was also set up the plea that the summary fashion in which the investigating committee had arrived at its decision amounted to a denial of the republican form of government. Justice Harlan did not dwell on that point as much as on the question of due process of law. The court dismissed the case for want of jurisdiction, upon the ground that a public office is not property within the meaning of the Constitution, and that the whole question was political.

Justice Harlan thought that the court ought to have taken jurisdiction and declared to whom the office belonged. He thought that the right to an office was property, the ownership of which could not be interfered with without due

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process of law. He said: "The majority of this court decide that an office held under the authority of a State cannot in any case be deemed property within the meaning of the 14th Amendment, and hence, it is now adjudged, the action of a state legislature or state tribunal depriving one of a state office—under whatever circumstances or by whatever mode the result is accomplished—cannot be regarded as inconsistent with the Constitution of the United States. Upon that ground the court declines to take jurisdiction of this writ of error. If the court had dismissed the writ, or affirmed the judgment upon the ground that there had been no violation of the principles constituting due process of law, its action would not have been followed by the evil results which, I think, must inevitably follow from the decision now rendered."

From this it appears that Justice Harlan did not base his objection to the decision so much upon the assertion that in this particular case one had been deprived of property without due process of law, as upon the assertion of the court that public office cannot under any circumstances be considered property. It is clear, however, that he thought a proper investigation of this case would have found that the one who held office was not the one who had received the majority of the votes. It might have been difficult for the court to find that there was not deprivation without due process of law if public office had been declared to be property, yet if it were property the question should have been answered.

Justice Harlan furthermore challenged the assertion that precedent gave no grounds for determining whether a man had been deprived of his office without due process of law. He found by an examination of former decisions that whenever the dispute had been between individuals, public office had been considered a property right, whereas when the dispute was between the individual and the State, it had not been considered a property right. In the case of Kennard v. Louisiana, ex rel. Morgan, 92 U. S. 480, he

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found that the court had determined this very point. The claim had been advanced in that case that the State, through her judiciary, had deprived Kennard of his office without due process of law. But the court took jurisdiction of the case and affirmed the judgment of the supreme court of Louisiana upon the ground that the requirement in the fourteenth amendment of due process of law had not been violated. With this case as a precedent, the court refused to dismiss the case of Foster v. Kansas, ex rel. Johnston, 111 U. S. 201, where the sole issue was as to the right of Foster to hold the office of county attorney. In the case of Boyd v. Nebraska, ex rel. Thayer, 143 U. S. 135, the court had removed Boyd from office as governor of Nebraska and put Thayer in his place. In the case of Wilson v. North Carolina, 169 U. S. 586, the court had again declared that under justifying circumstances it would investigate and determine who was rightly entitled to hold office. From these cases it is seen that the court was not without significant precedent to answer the question asked.

Justice Harlan, after reviewing these cases, said: "When the Fourteenth Amendment forbade any State from depriving any person of life, liberty, or property without due process of law, I had supposed that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibitions of that Amendment, as we have often said, apply to all the instrumentalities of the state, to its legislative, executive, and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that 'whoever by virtue of public position under a state government deprives another of property, life, or liberty without due process of law . . . violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or [as we have often said] the constitutional prohibition has no meaning.'"

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These quotations show sufficiently well the grounds upon which Justice Harlan based his arguments. He evidently felt that with an impartial tribunal such as he conceived it the duty of the court to be, one that would shut out all other considerations and decide each particular case by an honest application of reason to law, such an explanation of the due process clause would have been a healthful interpretation of the Constitution, for it might serve to counteract much trickery in state elections.

The difference between what Justice Harlan conceived to be due process of law with regard to the taxation of property and the opinion which has been established by the decisions of the court seems to have revolved around the single point of special assessments. In a series of cases involving this question Justice Harlan has held consistently to one doctrine, and he has characteristically asserted it whenever the question has come before the court.

Before discussing the cases involving the principle of special assessment, a brief consideration may be advisable of the case of Linford v. Ellison, 155 U. S. 503, in which Justice Harlan was apparently in favor of a tax which contained an element of the injustice imputed to the special assessments as interpreted by the Supreme Court. In this case the court dismissed a suit against the city of Kaysville, in the Territory of Utah, because the amount of money involved did not give jurisdiction. The dispute arose out of the sale of a wagon belonging to a farmer living away from the settled portions of the city, to obtain the sum of fifty dollars due under the tax levied by the city. The sale of the wagon was effected by James H. Linford, Jr., the tax collector, and the suit was instituted against him by Ephraim P. Ellison, whose wagon had been sold, under the plea that since his property was too far removed from the city to receive any benefit from being within the corporate limits, the city tax upon his land took property without due process of law. The territorial court sustained his plea,

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and refunded to Ellison the fifty dollars. The case was appealed to the Supreme Court of the United States by the tax collector for a determination of the question whether the tax took property without due process of law. The court dismissed the case, asserting that since the amount involved was less than five thousand dollars it did not have jurisdiction. Justice Harlan, however, dissented from the opinion. He asserted very emphatically that the Supreme Court was called upon to review an act of a subordinate governmental authority which had been accused of taking property without due process of law, and that even if the amount in dispute did not reach the sum of five thousand dollars it was nevertheless a question for the court to answer.

In this connection he said: "It is not disputed that the plaintiff's lands are within the limits of Kaysville, as defined by the act of the territorial legislature. It is conceded that the seizure of the plaintiff's wagon for the taxes on his lands was legal, if the statute of the territory was constitutional so far as it authorized taxes to be imposed on such lands within the defined limits of Kaysville, as were agricultural lands, namely, lands outside of the platted part of the city, which did not receive the benefits of the city government. I submit that there is no disputed question in the case, except that which involves the constitutional power of the territorial legislature, acting under the United States, to authorize the imposition of taxes for city purposes on lands situated as are those of the plaintiff. The facts were agreed and it is apparent that the parties intended to raise no question except as to the validity of the authority exercised by the territorial legislature in empowering the city of Kaysville to tax the lands here in question."

The case of Norwood v. Baker, 172 U. S. 269, in which Justice Harlan rendered the opinion of the court, contains the essence of his doctrine on the point of special assessment. This case involved an unusually expanded burden upon an individual, and, as Justice Harlan contended, was

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an instance of what might be continually occurring, though to a less degree, when the attempt is not made to fix by the benefit received the proportion of special assessment that persons affected should pay. Here the property condemned was a strip of land belonging to a Mrs. Baker. The compensation made for the piece of land was $2000. The special assessment upon the owner amounted to $2218.58. Thus the owner was given less for her land than she had to pay as a special assessment; in other words, the city was charging her $218.58 for taking her land. This the court, speaking through Justice Harlan, held to be taking property without due process of law. "In our judgment the exaction from the owner of private property for the cost of public improvement in substantial excess of the special benefit accruing to him is, *to the extent of such excess,* a taking . . . of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." It is thus seen that Justice Harlan did not desire the impossible,—an exact apportionment of the assessment according to the benefits to be derived, but at least an attempt at justice.

As has been noted, this decision put an aspect of uncertainty upon the law, for prior to this time the so-called frontage rule had been the method of special assessment. When the case of French v. Barber Asphalt Paving Co., 181 U. S. 324, came before the court, the decision of Norwood v. Baker was apparently overturned. The later case came, by writ of error, from the supreme court of Missouri. Improvements had been made by the Barber Asphalt Paving Company on a certain avenue in Kansas City, Missouri. A special tax had been assessed upon the owners of lots abutting on this avenue, to help pay for the new pavements. To this end liens had been taken upon those lots to

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secure the tax. The paving company instituted a suit to enforce these liens so as to receive payment for the work done by them. The state supreme court decided in favor of the company. Thereupon an appeal was taken to the Supreme Court by French and others, owners of abutting lots, who asserted that such a tax amounted to the taking of property without due process of law. The Supreme Court affirmed the decision of the state court, and thus reasserted the validity of the frontage rule.

In dissenting from this opinion Justice Harlan reasserted the doctrine laid down in Norwood v. Baker, and criticized the court for not following the precedent set by that case. He furthermore accused the court of vagueness as to what consideration should guide it thereafter in deciding whether or not a special assessment amounts to the taking of property without due process of law. He contended more vigorously than ever that no special assessment made without inquiry as to the benefits to be received by the individual through the improvement should be upheld. In concluding he said: "In my opinion the judgment in the present case should be reversed upon the ground that the assessment in question was made under a statutory *rule* excluding all inquiry as to special benefits and requiring the property abutting on the avenue in question to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it; leaving Kansas City to obtain authority to make a new assessment upon the abutting property for so much of the cost of paving as may be found upon due inquiry to be not in excess of the special benefits accruing to such property."

It may be judged from the above cases that Justice Harlan's constitutional doctrine as to the relation between special taxation and due process of law is that any special tax levied is unconstitutional if it does not at least purport to give to the person upon whom it is imposed a benefit equivalent to the amount paid. In other words, he believed that the doctrine promulgated in Norwood v. Baker should

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always hold. The exact difference between this doctrine and that of the court needs to be noted. The court looked only to the neighborhood upon which the assessment had been made, and tried to make sure that the assessment would not be greater than the benefits to be derived by that section as a section. Justice Harlan wished to look deeper and ascertain whether the individuals who had to pay the money would stand a reasonable chance of getting value received. The illogicality of the court's decree is evident. Under such law it is possible that some will pay for benefits enjoyed only by others. That, however, is the law, and it seems to have been established because of ease of application.[6]

In concluding this review of Justice Harlan's opinions regarding due process of law, it is seen that he was violently opposed to any alteration of the time-honored jury system; that he believed that public office should be considered property, of which one could not be deprived without due process of law; and that in levying special assessments attempt should always be made to find out whether the individual is likely to be benefited to the amount of the assessment levied. On each of these points he differed from the court, and stood by these principles to the last.

[6] See also Wight v. Davidson, 181 U. S. 374, and Tonawanda v. Lyon, 181 U. S. 389, for similar dissents by Justice Harlan.

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CHAPTER IV

Interstate and Foreign Commerce

Liquor Legislation.—The question of interstate and foreign commerce is probably the most involved one in constitutional law. Its difficulty is lessened in the present instance by reason of the fact that it will not be necessary to review it in all its aspects. On the questions here involved Justice Harlan held, in certain respects, as decided views as on any other subject. With reference to state liquor legislation there are two marked dissents, which, though they are now mainly of historic value, will be of interest in showing his insight into what was to come. The two cases are Bowman v. Chicago and Northwestern R. Co., 125 U. S. 465, and Rhodes v. Iowa, 170 U. S. 412.

In the former case there is called into question a statute of the State of Iowa which attempted to forbid the transportation of spirituous liquors into that State. The case came up in a suit for damages against the railroad company for refusing because of the Iowa law to accept a shipment of beer from Chicago consigned to a place in Iowa. The court held, in accordance with the plea of the liquor dealers, that the statute in question was unconstitutional, for the following reasons: First, it was a burden on interstate commerce in that it impeded the free interchange of goods between Illinois and Iowa. "In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defense a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extraterritorial force which does not belong to the law of the State of Il-

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linois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter?" Second, the Constitution does not leave it to the States to say what shall or shall not be suitable articles of commerce. To hold otherwise would be to assert that "it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other." Third, the Iowa law was not a legitimate exercise of the police power. "It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. . . . The right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction."

The above outline gives the attitude of the court in this case. The following quotation will indicate the position which Justice Harlan assumed: "The fundamental question, therefore, is whether Iowa may lawfully restrict the bringing of intoxicating liquors from other States into her limits, by any person or carrier for another person or corporation, except such as are consigned to persons authorized by her laws to buy and sell them for the special purposes indicated. In considering this question, we are not left to conjecture as to the motives prompting the enactment of these statutes; for it is conceded that the prohibition upon

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common carriers bringing intoxicating liquors from other States, except under the foregoing conditions, was adopted as subservient to the general design of protecting the health and morals and the peace and good order of the people of Iowa against the physical and moral evils resulting from the unrestricted manufacture or sale of intoxicating liquors."

Justice Harlan's argument rests upon the assertion that liquors are inherently not suitable articles of commerce. "It is admitted that a State may prevent the introduction, within her limits, of rags or other goods infected with disease, or of cattle or meat or other provisions which, from their condition, are unfit for human use or consumption; because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health and the public morals; what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution of the United States, a State can protect her sound cattle . . . she ought not to be deemed disloyal to that Constitution when she seeks by similar legislation to protect her people and their homes against the introduction of articles which are, in good faith, and not unreasonably, regarded by her citizens as 'laden with infection' more dangerous to the public than diseased cattle, or than rags containing the germs of disease."

The next argument presented by Justice Harlan was that the framers of the Constitution could not have intended—whether Congress had or had not chosen to act upon this subject—"to withhold from a State authority to prevent the introduction into her midst of articles or commodities, the manufacture of which, within her limits, she could prohibit, without impairing the constitutional rights of her own people. . . . Even the constitutional prohibition upon laws

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impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as the one or the other may be involved in the execution of such contracts." In further substantiation of the contention that the police power of the State allowed the State to regulate almost anything that had to do with public health and morals he cited the case of Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245. Other cases are cited which bear on this point. "The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society than their power in respect to trade and commerce having no possible connection with those subjects."

It is difficult to overemphasize the importance of the case of Bowman v. Chicago and Northwestern R. Co. in its relation to the bearing of liquor legislation of the States upon interstate commerce. This was the first time that such legislation was contested before the Supreme Court. Here, as Justice Harlan showed, the court had plenty of authority to declare such legislation constitutional. As a matter of fact, the court had to go out of its way to declare the law unconstitutional. Here once and for all the relation between liquor legislation and interstate commerce could have been settled by declaring spirituous liquors unfit articles of commerce, of such a kind as ought not to be forced upon the States against their wills. If the decision, therefore, had been made according to Justice Harlan's doctrine, the whole history of this matter would have been changed. There would have been no need for the Wilson Bill, or for the Webb-Kenyon Act which puts into the hands of the States exactly the power that an affirmative decision in this case would have done. The tangle which has resulted would have been avoided.[1]

To follow out the progress of the doctrine of the Supreme Court relating to the traffic in intoxicating liquors the case of In re Rahrer, 140 U. S. 545, must next be con-

[1] Note the case of Leisy v. Hardin, 135 U. S. 100, where Justice Harlan concurred in a dissent upon similar grounds.

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sidered. This case involved the constitutionality of a statute of Congress which tried to undo the mischief done by the Bowman case. This act, known as the Wilson Act, provided that "upon arrival" of the liquor in any State or territory it should become subject to the laws there. This law was declared constitutional, and seemed to be the remedy for the situation. Justice Harlan dissented from the reasoning of the court, but agreed with the decree. Since no opinion is stated by him it cannot be known upon what ground he differed from the court. It is sufficient to say that in this case a law was declared constitutional which seemed to give the States full power to control the liquor traffic, and that Mr. Harlan agreed that it was constitutional.

When, however, a case came up under the Wilson Act, the interpretation which the court gave to the phrase "upon arrival in a State" overthrew the force of the act. In this case, though Justice Harlan did not submit a separate dissenting opinion, he concurred in one given by Justice Gray.[2] This case, Rhodes v. Iowa, 170 U. S. 412, arose because of the fact that an officer of the State of Iowa, acting under authority of a state law, had seized and destroyed at the border of the State a shipment of liquor from Illinois. The statute in question was almost identically the same as the one which had been declared unconstitutional in the Bowman case, and the main point to be decided was whether the subsequent act of Congress had made it constitutional for States to pass laws like the one in question. Had Congress acted so as to remove the barrier of interstate commerce from the States in their attempts to pass laws forbidding the sale of liquor within their borders?

The court held that the statute of the State of Iowa was constitutional, but in order to do so found it necessary so to interpret the Wilson Act that laws passed by the States under its operation were ineffective in driving out the liquor business. The Wilson Act had stipulated that liquor should

[2] It must be noted that the case of O'Neil v. Vermont, 144 U. S. 323, would have involved this same point had the court taken jurisdiction. In that case Justice Harlan delivered a stinging dissent because of the refusal of the court to determine the case.

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become subject to state law "upon arrival in a State," but the court so interpreted this phrase that the goods could proceed to their destination without interruption. "Only after their coming into the State and the consummation of their shipment" did the goods become subject to the laws of the State. "The words 'shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory' in one sense might be held to mean arrival at the state line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word 'arrival' signified that the goods should actually come into the State, since it is provided that 'all fermented, distilled, or other intoxicating liquors or liquids transported into a state or territory,' and this is further accentuated by the other provision, 'or remaining therein for use, consumption, sale, or storage therein.'"

"This language makes it impossible in reason to hold that the law intended that the word 'arrival' should mean at the state line, since it presupposes the coming of the goods into the state for 'use, consumption, sale, or storage.'"

It is easy to see the nature of the argument. By indulging in the use of the "subtle signification of words and the niceties of verbal distinction" which they condemn as not furnishing a safe guide, the judges came to their conclusion. But it must be added that this was done under the assumption by the court that unless such a meaning were attached to the word "arrival" the act would not have been constitutional.

Naturally the dissenting opinion centered its argument in the word "arrival." It contended that no such distorted meaning needed to be attached to that word in order to

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allow the Wilson Act to stand. It asserted and reinforced the assertion that liquor legislation was a legitimate subject for the police power of the State. That being true, there was little question that the act of Congress was constitutional under the broader interpretation of the word "arrival," which was quoted as follows from Chief Justice Marshall: "'To arrive' is a neuter verb, which when applied to an object moving from place to place designates the fact of 'coming to' or 'reaching' one place from another, or coming to or reaching a place by travelling or moving towards it. If the place be designated, then the object which reaches a place has arrived at it. A person who is coming to Richmond has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate destination, or the end of his journey. A person going from Richmond to Norfolk by water arrives within Hampton Roads when he reaches that place; or if he diverges from that direct course he arrives in Petersburg when he enters that town. That is, I believe, the universal understanding of the term."[8]

As is of course known, there has been another act of Congress which in its meaning amounts to making it unlawful for any fermented liquors to be carried into any place where the people have voted it out. The violations of this act the States are left to punish as violations of their laws. It seems to be generally accepted that this act will be declared constitutional. The situation is now just about as it would have been had the Bowman case been decided according to Justice Harlan's doctrine. Spirituous liquors have practically been declared an article that a State, if it pleases to do so, may designate as unfit to be carried within its borders.

Race.—Justice Harlan's attitude regarding legislation as to race distinctions in interstate commerce may readily be guessed. The question seems to have come up only as re-

[8] The Patriot, 1 Brock. 407.

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gards the Jim Crow laws. There are two cases which are strongly in opposition to each other. In the one, Hall v. Decuir, 95 U. S. 485, the Supreme Court declared unconstitutional a statute of Louisiana which forbade the separation of races on steamboats, as being a burden placed by a State upon interstate commerce; and in the other, Louisville, N. O. and T. R. Co. v. Mississippi, 133 U. S. 587, it declared valid a law of Mississippi which required that the races be separated on the trains as not being a burden imposed by the State upon interstate commerce. A full discussion of the latter case will be sufficient to give the import of both. From the first decision Justice Harlan did not dissent, but from the other he did. The case came by writ of error to the Supreme Court of Mississippi to pass upon the constitutionality of a statute of that State which required separate coaches for colored people. The railroad company violated that law in refusing to furnish separate accommodations, and argued that the statute was unconstitutional in that it amounted to a regulation of interstate commerce.

In rendering the decision, the court, speaking through Justice Brewer, asserted that the statute affected commerce only within the State, and was therefore within the power of the State to pass. The main contention between Justice Harlan and the court was as to the precedent set by Hall v. Decuir. Justice Brewer attempted to explain away that case as follows: "So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodation with colored passengers, was a question of interstate commerce, and to be determined by Congress alone. In this case the supreme court of Mississippi held that the statute applied solely to commerce within the State; and that construction, being the construction of the Statute of the State by the highest court, must be conclusive here. If it be a matter

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respecting wholly commerce within the State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution." The two cases seem to admit tacitly that the Supreme Court of the United States will hold statutes discriminating against colored persons constitutional if the state courts will uphold them, but they do not seem to say that the court will declare statutes of the same nature unconstitutional if declared unconstitutional by the state courts.

This doctrine did not meet with Justice Harlan's approval. Commenting on the differentiation made by the court, he said: "In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while the trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce and the latter is not. It is difficult to understand how a State enactment requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character." In other words, Justice Harlan said that the ruling of the state courts on the matter did not have weight. It was for the United States Supreme Court to say, and if they had said that one thing was interstate commerce, that thing was interstate commerce, even if the state court said that it was not.

This gives in sufficient fulness the nature of the above decisions and dissent. These seem to be the only cases in which there were decisions by the Supreme Court on the question of separation of races on interstate carriers. The dissent from Louisville, N. O. and T. R. Co. v. Mississippi seems to be the only assertion made by Justice Harlan

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regarding the bearing of such laws upon interstate commerce, but it can be readily seen that if he had had his way the Jim Crow laws would have been brushed aside.

The Sherman Anti-Trust Law.—In this subject are found Justice Harlan's most vigorous dissents. It was due to the fact that these cases were so much in the public eye that Justice Harlan became so prominently known as a dissenter. Though it is true that he gave more dissenting opinions in the earlier part of his life than he did in the later, yet his earlier dissents seem not to have attracted so much attention, probably because the subjects were less conspicuous. It may be asserted, therefore, that from the E. C. Knight case to his death Justice Harlan was more prominently before the public than at any previous time, and deservedly so, because his dissents were greater and rang more truly of the democratic spirit.

The first case arising under the anti-trust act of 1890 was that of United States v. E. C. Knight Co., 156 U. S. 1. Though this case is hardly any longer citable for precedent, it will be interesting to follow out the change of opinion on this subject on the part of the Supreme Court. The case came into the Supreme Court under the following circumstances: A corporation, chartered under the laws of Pennsylvania, had been arraigned before the United States circuit court of appeals for the third circuit for having violated the act of 1890, in that it had resorted to an unlawful restraint of trade in violation of the statute of the United States forbidding all monopoly in restraint of trade. The suit, therefore, was against the various companies which had conspired to form the American Sugar Refining Company. The circuit court of appeals decided in favor of the corporation, and the Supreme Court affirmed its decision.

The following is a synopsis of the decision of the Supreme Court: First, referring to a definition of the word "monopoly" mentioned by the counsel for the United States as being applicable in English law, the following comment was made: "But the monopoly and restraint denounced by the

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act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

"In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed."

Second, the control of this matter was to be exercised by the States: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

"It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected." Again: "It is true that the bill alleged that the products of these refineries were sold and distributed among the several states, and that all the companies were engaged in trade or com-

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merce with the several states and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function."

Thus the argument of the court was placed expressly on two grounds, in the first place, that theoretically there was not a monopoly. Even though the syndicate did embrace all the sugar-refining companies in the country, that was no reason why others might not develop in the future. In the second place, in order to preserve the police power of the States it was advisable to leave such matters in their hands.

Justice Harlan's dissent may be quoted at length. "If it be true that a *combination* of corporations or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce *among the states* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests."

In answer to the question as to what is an unlawful restraint of trade he said: "A general restraint of trade has often resulted from *combinations* formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right and are crimes against the public."

In reference to the inapplicability of the state power to this question he spoke as follows: "There is a trade among the several states which is distinct from that carried on within the territorial limits of a state. The regulation and control of the former is committed by the national Constitution to Congress. Commerce among the states, as this court

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has declared, is a unit, and in respect of that commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot interfere with the enforcement of such rules. The jurisdiction of the general government extends over every foot of territory within the United States. Under the power with which it is invested, Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the states. In so doing it would not interfere with the 'autonomy of the States,' because the power thus to protect interstate commerce is expressly given by the people of all the states. Interstate intercourse, trade, and traffic is absolutely free, except as such intercourse may be incidentally or indirectly affected by the exercise by the state of their reserved police powers."

A further comment upon the inconsistency of the view of the court is expressed in these words: "Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other states, cannot be imposed even by a state without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *state* within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar *to be transported to other states,* how comes it that combinations of corporations or individuals, within the same state, may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article *to be carried from the state in which such purchases are made?* If the national power is competent to repress *state* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one state to another state, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals

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may—so far as national power and interstate commerce are concerned—do, with impunity, what no state can do."

Thus it is seen that, according to Justice Harlan's interpretation of the opinion of the court, the court had declared to be within the jurisdiction of the State that which, by this decision, had more power than the States themselves had.

One other quotation will help to substantiate the doctrine set forth by Justice Harlan. He said: "After the fullest consideration I have been able to bestow upon this important question, I find it impossible to refuse my assent to this proposition: Whatever a state may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the states—for this purpose one people—against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several states. If, as already shown, a state may prevent or suppress a *combination,* the effect of which is to subject its domestic trade to the restraints necessarily arising from their obtaining the absolute control of the sale of a particular article in general use by the community, there ought to be no hesitation in allowing to Congress the right to suppress a similar *combination* that imposes a like unlawful restraint upon interstate trade and traffic in that article. While the states retain, because they have never surrendered, full control of their complete internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of Congress."

His doctrine might be summarized by saying that since the States were not allowed any control over interstate commerce, and since the regulation of corporations in their interstate relations constituted regulation of interstate commerce, or rather of a part of interstate commerce, the power expressly belonged to the national government. As will be seen, this later through the effort of Justice Harlan became the doctrine of the court. By that time much mis-

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chief had been done, and the court had lost the opportunity of cutting at the root of the growing evil.

In the case just discussed, Justice Harlan stood alone against the other members of the court. The next time he is found taking an active part in a decision on this point is in the case of the Northern Securities Co. v. United States, 193 U. S. 197. In several cases prior to that, however, the question had come up, but in not quite so aggravated a form. From only one of those cases did Justice Harlan dissent, and then with no opinion stated.[4]

In the case of the Northern Securities Co. v. United States Justice Harlan asserted, mainly in an affirmative way, the principles which he had developed in his dissent from the E. C. Knight case. The discussion is somewhat long, but much of the space is taken up in answering some of the arguments presented by the attorneys for the corporation, which answers are of no especial concern here. Quotations from this opinion will show how it served to overthrow the condemnable doctrine promulgated in the E. C. Knight case.

The Northern Securities case was very similar to the E. C. Knight case, the main difference being that the monopolization was of railroads instead of sugar. The suit, therefore, was against several railroad companies which had arranged to put a stop to competition in the north and northwestern sections of the United States by controlling under one head practically all of the railroads in the north and northwestern part of the United States. The question to be determined was whether such a combination amounted to a restraint of trade forbidden by the act of 1890, and whether the United States had the power to command these corporations to refrain from their proposed combination. The decision had been rendered against the Northern Se-

[4] U. S. v. Trans-Missouri Freight Assoc., 166 U. S. 290; U. S. v. Joint Traffic Assoc., 171 U. S. 505; Hopkins v. U. S., 171 U. S. 578; Addyston Pipe and Steel Co. v. U. S., 175 U. S. 211; Montague and Company v. Lowry, 193 U. S. 38; Anderson v. U. S., 171 U. S. 604 (combination legal, Justice Harlan dissented).

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curities Company in the circuit court of the United States for the district of Minnesota, and this decision was affirmed by the Supreme Court, speaking through Justice Harlan.

The following quotation gives the general import of the majority opinion: "The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory."

In answer to the contention that an affirmative decree in this case would make *ownership* of stock in a state railroad corporation a matter of interstate commerce, if that railroad were engaged in interstate traffic, the following reply is given: "Such statements as to issues in this case are, we think, wholly unwarranted, and are very wide of the mark; it is setting up mere men of straw to be easily stricken down. We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can

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stand in the way of the enforcement of the national will, legally expressed."

Another very telling blow at the contention that this doctrine would be a detriment to state autonomy is this: "If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it? . . . The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of helplessness, so far as the protection of the public against such combination is concerned."

As is seen, even by the few quotations given, the decision in this case was a great one. Its arguments were convincing, its spirit showed a largeness of soul not often found among judges, and it sets a precedent that needed to be set much earlier. From that time on, therefore, the monstrous, soulless corporations have had over them the strongest power that this government affords. And, as has been seen, our thanks are largely due Justice Harlan for this evidently correct interpretation of the Constitution, for any other would simply have said that our constitution contained a grave flaw. Of course the situation could have been met with a constitutional amendment, but only after much more mischief had been done.

The two cases which have caused so much comment of late do not bear upon the present subject. They are the cases of the Standard Oil Co. v. United States, 221 U. S. 1, and the United States v. American Tobacco Co., 221 U. S. 106. Although Justice Harlan concurred in the conclusions arrived at in these cases, he dissented from the action of the court in reading the word "unreasonable" into the

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Act of 1890. With him that was judicial legislation. These cases will, therefore, be discussed under that topic.[5]

From the cases given it seems possible to gain a sufficiently clear conception of Justice Harlan's doctrine concerning the so-called Sherman Anti-Trust Act. Though the court has not in all respects accepted his interpretation, it has practically done so. The weight of his influence on this point has probably been more significant than upon any other burning question. Amidst the wild political discussions he did not lose his balance, but always held closely to the interpretation of both the Constitution and an act of Congress, and on this subject, at least, demonstrated that the wisest thing for the court to do is to interpret and apply laws, not to change them. If Justice Harlan's doctrine had from the first predominated, the so-called twilight zone would have been much less in evidence.

Taxation.—According to the recognized law, any owner, whether individual or State, may impose a charge for the use of a wharf. This charge, however, cannot be too high, and must be levied with a view to keeping up the wharf, otherwise it becomes a burden upon interstate commerce and hence unconstitutional. This distinction sometimes gives rise to very fine differentiations in order to ascertain what is simply a wharfage charge, and what amounts to a duty of tonnage or poundage.

There seems to be only one case in which Justice Harlan was at variance with the court on this question. This was the case of Parkersburg and Ohio River Transportation Co. v. Parkersburg, 107 U. S. 691. The city of Parkersburg, West Virginia, levied under the guise of wharfage a tax upon vessels according to their capacity and the quantities of freight loaded or unloaded. The Parkersburg and Ohio River Transportation Company entered suit in the circuit court of the United States for that district, on the plea that the levy amounted to a duty of tonnage and that it was a restriction upon interstate commerce. The circuit

[5] Pages 199–202.

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court held that the levy was a wharfage charge. The Supreme Court affirmed the decision, reinforcing the decree with complicated reasoning.

The core of the decision is found in the following quotation: "Now wharves, levees and landing places are essential to commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local state laws. Congress has never yet interfered to supervise their administration; it has hitherto left this exclusively to the States. There is little doubt, however, that Congress, if it saw fit, in case of prevailing abuses in management of wharf property, . . . might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to put its regulations into effect by judicial proceedings properly instituted. But until Congress has acted, the courts of the United States cannot assume jurisdiction over the subject as a matter of Federal cognizance. It is the Congress, not the judicial department, to which the constitution has given power to regulate commerce with foreign nations and among the States. The courts can never take initiative on this subject."

From this it is seen that the court asserted that it was unwilling to take cognizance of a case of this kind in the absence of a statute of Congress. But it intimated further on that if the charge were extortionate it might take jurisdiction, but that ordinarily such things are in charge of the State unless Congress has acted on the subject.

Justice Harlan disagreed with this reasoning. With him the Constitution was express in forbidding tonnage and poundage, and he thought that it was for the court to decide whether or not any charge made by any state agency amounted to tonnage or poundage, or whether it was simply wharfage. In this case he contended that the levy was a duty of tonnage, and hence was unconstitutional. "It is conceded by the demurrer to the bill that, from these fees,

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the City has long since been re-imbursed for the actual cost of constructing the wharf; that the amount, annually collected for its use by boats, is largely in excess of any expense incurred in its maintenance and repair; that the wharf has been permitted to become and remain in bad repair, at times almost unfit for use; that nearly all the money so raised is applied by the City to increase its general revenue, and to payment of its indebtedness; lastly, that the wharfage charges are *unreasonable in amount and oppressive*. . . .

"In the opinion of the court, a duty of tonnage is defined to be a charge, tax or duty on a vessel for the mere privilege of entering or lying in a port. The City of Parkersburg cannot, therefore, constitutionally impose a charge, tax or duty upon or for the exercise of that privilege. Now, do the Constitution and the existing laws of the United States extend their protection no further than to secure the bare, naked right of entering a port free from local burdens or duties upon its exercise? May not the boat, in virtue of the Constitution and existing laws, also land at any wharf, at least at any public wharf, on the Ohio River for the purpose of discharging and receiving freight and passengers? Of what value would be the right to enter the port without the privilege of landing its passengers and freight? Is not the substantial privilege of landing passengers and freight necessarily involved in the right of entering the port? If so, it would seem that the right to land a boat at a public wharf on a navigable water of the United States, is as fully protected by the Constitution and the existing laws of the United States, as of entering the port. A charge, tax or duty imposed upon the exercise of the right to land is, consequently, for every practical purpose, as much a duty of tonnage as a charge, tax or duty upon the privilege of entering the port."

His conclusion is as follows: "The opinion of the court, I repeat, rests necessarily upon the ground that the enforced exaction and collection by a municipal corporation

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of unreasonable compensation for the use of its wharf by a boat, duly enrolled and licensed under the laws of the United States, and engaged in commerce upon the Ohio River, does not infringe or impair any right given or secured either by the Constitution or the existing laws of the United States. To that proposition I am unable to give my assent."

It is plain, therefore, that Justice Harlan could not see how a levy could be a wharfage charge when none of the proceeds were applied to the up-keep of the wharf, or how it could fail to be a tonnage charge when the rate was specified at so much a ton. Nor could he see how the court could refuse to pass upon the constitutionality of an action when that action clearly involved the interpretation of a clause of the Constitution. To summarize his doctrine on this matter, it might be said that he believed that it was within the jurisdiction of the court, regardless of the fact that Congress had not acted, to decide in any case whether a fee charged for the use of a wharf amounted to a duty of tonnage or poundage or a restriction upon interstate commerce, or whether it was simply a levy to cover the expense of the construction and repair of the wharf.

In the case of Ficklen v. Shelby County Taxing District, 145 U. S. 1, is found a very interesting dissent on the part of Justice Harlan, in which he accused the court of allowing discrimination in taxation, and discrimination of a kind that amounted to a burden on interstate commerce. An out-of-the-State concern had representatives in Shelby County, Tennessee. These representatives were simply agents, having a definite location for the exhibition of their wares and for taking orders of goods to be shipped into the State. In addition to a license fee of fifty dollars, the State, or rather the county, undertook to levy a tax of two and a half per cent on the profits made by one of these representatives. The plaintiff set up the plea that such a tax by the State amounted to a burden upon interstate com-

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merce. The court held that this was not such a burden, but that a State has power to tax all property having a situs within its limits whether it is employed in interstate commerce or not.

"No doubt can be entered of the right of a state Legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

Justice Harlan dissented from this ruling. At the outset he said: "It seems to me that the opinion and judgment in this case are not in harmony with the numerous decisions of this court. I do not assume that the court intends to modify or overrule any of those cases, because no such purpose is expressed. And yet I feel sure that the present decision will be cited as having that effect."

He said further: "The principles announced in these cases, if fairly applied to the present case, ought, in my judgment, to have led to a conclusion different from that reached by the court. Ficklen took out a license as merchandise broker and gave bond to make a return of the gross commissions earned by him. His commissions in 1887 were wholly derived from interstate business, that is, from mere orders taken in Tennessee for goods in other states, to be shipped into that State, when the orders were forwarded and filled. He was denied a license for 1888 unless he first paid two and a half per cent on his gross commissions. And the court holds that it was consistent with the Constitution of the United States for the local authorities of the taxing district of Shelby County to make it a condition precedent to Ficklen's right to a license for 1888 that he should pay the required per cent of the gross

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commissions earned by him in 1887 in interstate business. This is a very clever device to enable the taxing district of Shelby County to sustain its government by taxation upon interstate commerce."

The following distinctions are drawn in conclusion: "The result of the present decision is, that while under *Robbins* v. *Shelby County Tax. Dist.*, a license tax may not be imposed in Tennessee upon drummers for soliciting there the sale of goods to be brought from other states; while under *Leloup v. Port of Mobile*, a local license tax cannot be imposed in respect to telegrams between points in different states; and while under *Stoutenburgh* v. *Hennick*, commercial agents cannot be taxed in the District of Columbia for soliciting there the sale of goods to be brought into the District from one of the states; the taxing district of Shelby County may require, as a condition of granting a license as merchandise broker, that the applicant shall pay a license fee, and, in addition 2½ per cent upon the gross commissions received, not only in the business transacted by him that is wholly domestic, but in that which is wholly interstate."

The last quotations show clearly the ground of Justice Harlan's dissent. He could see no reason for refusing at one time to allow the State to tax persons in one category, and at a later date allowing it to tax another person in a similar situation. It must be admitted, however, that the situations were only apparently similar. The dissent was due to the fact that the tax was in effect upon interstate trade, and only interstate trade, for proof was present that the agent in question had done no intrastate business. With the court the fact that the man did only interstate business was immaterial, since his license granted him the right to sell goods produced within the State. Justice Harlan contended, however, that since the man in fact did no intrastate business he was beyond the taxing power of the State.

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The question of state taxation of federal franchises is a complex one. It appears, however, that the Supreme Court has done much to complicate instead of simplify the situation. The case of the Central Pacific R. Co. v. California, 162 U. S. 91, will bear out this assertion. This case came to the Supreme Court by writ of error from the supreme court of California. According to the railroad company's estimate, its taxable property in the State of California amounted to $12,273,785, while according to the estimate of the Board of Equalization the amount was $18,000,000. The railroad company objected because the Board of Equalization had included within its assessment the value of the company's federal franchise to engage in the business of interstate commerce, and said that this was unconstitutional in that it was a burden laid by the State upon a federal agency. The court decided against the railroad company upon the following grounds: The rights and privileges of doing business have value as taxable property, and in addition to the federal franchise there was a state franchise, admitted by the company. Upon this admitted franchise the State could place a tax. Since the express valuation of the state franchise was not given, the extra assessment could be taken to mean a tax by the State upon the state franchise.

Justice Harlan did not agree with this line of argument. He felt that if the State were allowed to tax as highly as it pleased the state franchise of a federal agency, that power might enable the State in certain instances seriously to hamper the performance of federal functions. He said: "If the assessment in question had been separately upon the visible property of the company, as distinguished from its franchises, the case would have presented a different aspect; and we should then have been compelled to re-examine the question as to the extent to which the property of the company, used in accomplishing the objects designed by Congress, could be taxed by the State. But, as the opinion of the court shows, the present assessment was

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upon the franchise, railway, roadbed, rails, and rolling stock of the company without stating separately their respective values. That which was invalid cannot be separated from that which was valid. So that the question is presented whether it is competent for the State to sell for its taxes the franchise of the company. If it cannot the whole assessment is void.

"I cannot agree that the franchise which the corporation has received from the United States and the state can be assessed by the state for taxation along with its roadbed, right of way, etc., and then sold. That is taxation of one of the instrumentalities of the national government, which no state may do without the consent of the Congress of the United States. Of course, this corporation ought to contribute its due share to support the government of each state within whose limits its property is situated and its privileges exercised. But it is for Congress to prescribe the rule of taxation to be applied at least to the franchises of the corporation, which, although created by the state, is as much a federal agency as if it had been created a corporation by national enactment. It has never heretofore been recognized that a state could, without the assent of Congress, sell for its taxes the franchises, rights, and privileges employed, under the authority of the national government, to accomplish national objects, particularly when such franchises, rights, and privileges are under mortgage to secure the government specified liabilities."

Justice Harlan held that if there was a federal franchise and at the same time a state franchise, the State should not be allowed to tax the state franchise without a separate specification as to what was the rate and amount of the tax on the state franchise; and above all the State should not be allowed the power to hamper by taxation a federal instrumentality.

Justice Harlan has differed from the court in two interesting cases with reference to export taxes, in one case say-

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ing that what the court claimed was a tax upon exports was not one, and in the other case arguing that what the court asserted was not a tax on exports was one.

The first of these cases is that of Fairbank v. United States, 181 U. S. 283. Here was contested the stamp duty levied upon various forms of commercial paper to help defray the expenses of the Spanish-American War, as applied to bills of lading accompanying shipments to foreign ports. The plea was set up that a tax of ten cents on every such bill of lading amounted to a duty upon exports, forbidden by the Constitution in Article 1, Par. 9, which reads that "no tax or duty shall be laid on any article exported from any State."

The court with a majority of one declared that such a tax amounted to a duty on exports in that the bill of lading was an essential accompaniment of articles of commerce. "We are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and, therefore, a tax or duty on exports, and in conflict with the constitutional prohibition."

Justice Harlan, with whom concurred Justices Gray, White, and McKenna, opposed this view. The grounds upon which they rested their arguments were two. In the first place, they held that since it had been the practice of the nation since 1797 at intervals to impose such a stamp tax, it was too late now to challenge the constitutionality of it. In the second place, a simple tax of ten cents upon a bill of lading of a large shipment of goods could not in fact amount to a duty upon exports, but was a tax on the paper.

In support of the first contention the several instances in which such a tax had been levied and collected were cited, and the fact was urged that not before within the century had they been even questioned. It should be mentioned that the majority had not passed lightly over this point, as is shown by the following words: "It must be borne in mind also in respect to this matter that during the first period

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exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war, or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution."

The other point, which seems to be the stronger, was not answered by the majority, though they alluded to it with the assertion that the power to tax is the power to destroy. The following quotation will show the reasoning of the minority in this regard: "It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of 10 cents upon the vellum, parchment, or paper on which is written a bill of lading for articles to be exported from a state, it could as well impose a duty of $5,000, and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for centuries, a well-defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of the property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of $5,000 for and in respect of the vellum, parchment, or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp-tax laws, and that the purpose and necessary operation of such legislation was, in violation of the Constitution, to tax the articles specified in such bill, and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity, or value of the articles ex-

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ported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment, or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported."

An interesting contrast to the Fairbank case is found in Cornell v. Coyne, 192 U. S. 418. Here the court upheld a statute which placed a direct tax of one per cent per pound on filled cheese. The contention was raised by Cornell, the manufacturer of the cheese, that this tax did not apply to that part of his products which was intended expressly for filling foreign orders. In spite of the decision in the Fairbank case, however, the court did not sustain his contention. No special argument was presented except that the cheese before shipment was just like other cheese which was intended for home consumption, and if part of it had to bear a tax all of it should. "The true construction of the constitutional provision," said the judge, "is that no burden by way of tax or duty be cast upon the exportation of articles, and does not mean that articles exported are relieved from prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before exportation."

Justice Harlan opposed the reasoning of the court on two grounds, in the first place, because of the possibility of great abuse developing from such a decree; and, in the second place, because it was inconsistent with the doctrine established in the Fairbank case, from which, it is to be noted, he dissented. Of the first point he said this: "The result would be that Congress, in time of peace, and by means of taxation, could bring about a condition of utter occlusion between the manufacturers of this country and the markets of other countries. Indeed, the several states could bring about that result by taxation; for if an article manufactured for exportation and which was prepared for exportation as soon as the manufacture was com-

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pleted, is not an *export* from the moment such preparation was begun, then a state may impose a tax upon it as *property* and compel the payment thereof before the article is removed from its limits for exportation. I do not think that the framers of the Constitution contemplated such a condition as possible."

As regards the second point he made the following assertion: "In the *Fairbank case* the court held that a mere stamp tax on a bill of lading taken at the time articles were shipped from a state to a foreign country was a tax on the articles themselves as exports, and was forbidden by the constitutional provision that no tax or duty shall be laid on articles exported from any state. It is now held that a tax on articles admittedly manufactured only for exportation, and not for sale or consumption in this country, and which are exported as soon as they can be made ready for shipment, after the completion of manufacture, in execution of contracts entered into prior to the commencement of manufacture, is a tax on the articles themselves *as property,* and not on them as exports. . . . Thus, despite the express prohibition of all taxes or duties upon articles exported from the states, Congress is recognized as having the same power over exports from the several states as it has exercisd over imports from foreign countries. I do not think that it has such power."

It is interesting to note the contrast between Justice Harlan's dissent from this case and that from the Fairbank case. In the former his argument was that the tax in question could not properly be construed to be a tax upon exports, because it was so small that it was impossible that it should affect the price of the article exported. In this case he asserted that the tax could not be construed in any other way, since the tax of one cent a pound on the exported cheese necessarily raised the price that much. But he seemed not to recognize that the tax on the cheese was not placed there because of its exportation. If the tax were on the export because it was an export, it would come within

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the constitutional provision; otherwise it would not. Yet if the Constitution is to be interpreted to mean that the framers wished to encourage exportation by exempting exports from all taxation, Justice Harlan's doctrine in this case will have to be accepted as correct. Such an interpretation, however, seems to be a discrimination against the home consumer.

A very hotly contested case on the question of the ability of a State to tax the gross receipts[6] of a railroad doing part interstate and part intrastate commerce was that of Galveston, Harrisburg, and San Antonio R. Co. v. Texas, 210 U. S. 217. In this case was contested an attempt of the State of Texas to impose a tax "equal to one per cent of their gross receipts" upon railway companies whose lines lay wholly within the State. The company sought to have refunded money which it had paid under such a levy, on the plea that the tax constituted a burden on interstate commerce.

The argument of the court, speaking through Justice Holmes, is found in the following quotation: "We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' 1 per cent of gross receipts, and a tax of 1 per cent of the same seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation

[6] For a significant discussion of the importance of this subject, and how the court got itself out of the evil effects of this decision, see E. R. A. Seligman, Essays in Taxation, ch. viii, pp. 264-270.

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tax, and in no way helped by the words 'equal to.'" As is seen, the contention centered around the wording of the statute, that the tax should be "equal to" the gross receipts. The court held that the State had attempted to make a distinction between a tax *equal to* and a tax *on* the gross receipts, in other words, that the gross receipts should be a gauge of the amount of business done in the State. This distinction was considered not well founded.

Justice Harlan, however, with whom concurred Justices Fuller, White, and McKenna, thought this a valid tax. Justice Harlan's reasons for not considering the tax an improper burden upon interstate commerce are mainly two. First, such a tax did constitute an occupation tax upon business within the State of Texas, which had been declared to be constitutional under the Texas constitution. "Such is the construction which the state court places on the statute, and that construction is justified by the words used. We have the authority of the Supreme Court of Texas for saying that the Constitution of that state authorizes the imposition of occupation taxes upon natural persons and upon corporations, other than municipal, doing business in that state. The plaintiff in error is a Texas corporation, and it cannot be doubted that the state may impose an occupation tax on one of its own corporations, provided such a tax does not interfere with the exercise of some power belonging to the United States."

Second, the minority held that the burden upon interstate commerce would be incidental and not direct, and hence would be constitutional, as the court had often previously asserted. "The state only measures the occupation tax by looking at the entire amount of the business done within its limits without reference to the source from which the business comes. It does not tax any part of the business because of its being interstate. It has reference equally to all kinds of business done by the corporation in the state. Suppose that the state, as, under its constitution it might do, should impose an income tax upon railroad corporations of

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its own creation, doing business within the state, equal to a given per cent of all incomes received by the corporation from its business,—would the corporation be entitled to have excluded from computation such of its income as was derived from interstate commerce? Such would be its right under the principles announced in the present case. In the case supposed the income tax would, under the principles or rules now announced, be regarded as a direct burden upon interstate commerce. I cannot assent to that view."

Justice Harlan's contention was, therefore, that the gauging of the amount of the tax by the gross receipts of a railroad company may have constituted an unsound method of taxation, yet since it could not be fairly said to be a direct burden upon interstate commerce, or opposed to any other prohibition in the United States Constitution, it was a valid method. This seems to be an instance when the liberality of the court allowed it to go into the merit of a state law and forbid it, even though there was not a really fair basis upon which to rest this disallowance.

Freedom of Contract.—The question of freedom of contract might well be discussed under a different heading, but since the specific cases so closely concern commerce, the matter may be taken up here. There are two cases in which the principle was primarily involved, namely, Hooper v. California, 155 U. S. 648, and Robertson v. Baldwin, 165 U. S. 275. The first involved a contract for insurance which was entered into contrary to the laws of California. The second involved the compulsion of seamen to perform their contracts.

The facts of the first case were these: Hooper was an agent for Johnson and Higgins, duly organized brokers in New York, who conducted an office in California according to the laws of that State. A citizen of California named Mott applied to Hooper to procure a certain amount of insurance for a vessel, named the *Alliance*. This Hooper succeeded in doing through his employers in the city of New York, who, in turn, secured the insurance from a Boston

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company which was not licensed to do business in California. The question was, could the California statute which forbade this transaction operate in this case, or was it an interference with privileges granted under the Constitution,—granted in the first place in the commerce clause, and in the second place in the fourteenth amendment. The court, speaking through Justice White, answered the question in the negative. Justice Harlan said that it should have been answered affirmatively.

The reasons for the holding of the court may be briefly stated as follows: First, insurance business had been declared not to be commerce, and the exclusive control by Congress of marine affairs did not alter this declaration. Insurance policies were no more articles of commerce on the sea than on the land. "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" Second, Hooper could not be considered an agent of Mott in procuring this insurance for him, but he had to be looked upon as an agent of the Boston company, which was not licensed to do business in California, and hence Mott was not unconstitutionally deprived of his liberty of contract. "If the contention of the plaintiff in error were admitted, the established authority of the state to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the state, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but

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upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

Justice Harlan dissented upon the following grounds: "We have before us a statute making it a crime to procure or agree to procure, in California, for a resident of that state, a policy of insurance from a foreign corporation which does not propose to do business there by agents, and, so far as appears, has never issued to a resident of California any policy but the one issued to Mott." This he goes on to say "is an illegal interference with the liberty both of Mott and of Hooper, as well as an abridgment of the privileges, not of a foreign corporation, but of individual citizens of other states through whom the policy in question was obtained."

He said further: "If he [Mott] preferred insurance in a company that had no agent in California, he had a right to that preference; and any interference with its free exercise would infringe his liberty. Suppose he had himself applied, by mail, directly to Johnson & Higgins for insurance on his vessel, and that firm had delivered the policy in question to an express company with directions to deliver it to Mott. Or, suppose that Mott had made his application, by mail, directly to the company. I cannot believe that a statute making his conduct, in either of the cases supposed, a criminal offence, would be sustained as consistent with the constitutional guaranties of liberty. But, it seems from the opinion of the court, that a state is at liberty to treat one as a criminal for doing for another that which the latter might himself do of right and without becoming a criminal. In my judgment a state cannot make it a crime for one of its people to obtain, himself or through the agency of individual citizens of another state, insurance upon his property by a foreign corporation that chooses not to enter the former state by its own agents."

This brings out clearly enough the ground of Justice Harlan's dissent. But when one considers the import of the

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reasoning here set forth one must admit that according to this doctrine an insurance company could do business within a State without complying with the laws of that State. In this case Justice Harlan doubtless let his fondness for freedom get the better of his judgment. If the above case had gone according to his doctrine, the declaration that insurance policies are not articles of commerce would have been useless, for, as the majority opinion pointed out, the insurance companies could do all business through representatives without of necessity complying with the state laws. Though there is no direct assertion to that effect, one feels from this decision that Justice Harlan thought that insurance policies ought to have been declared articles of commerce.

In Robertson v. Baldwin, 165 U. S. 275, Justice Harlan dissented more vigorously along lines similar to those of the Hooper case. The circumstances and argument of this case can be stated very briefly. Certain seamen were arrested in San Francisco and forced, against their will, to go back to work on a vessel engaged in commerce. The employers claimed that the men had agreed to work in this vessel until it should return to some port in the United States. The plea of the seamen was that the act of Congress authorizing their seizure by a justice of peace and return to the vessel was unconstitutional in that it forced them into involuntary servitude.

The majority of the court held that the contract of seamen differs from other contracts. Tracing the laws from the earliest times, Justice Brown, rendering the opinions of the court, showed that sailors have always had this coercion applied to them. "In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the 13th Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts."

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Justice Harlan looked at this question differently. He contended that such compulsion was involuntary servitude, and that citations from history had no bearing since, throughout history, slavery itself had been legal. Nor did he think that the nature of the undertaking gave sufficient reason to force the men to work. In regard to this last point he said: "Under the contract of service, it was at the volition of the master to entail service upon these appellants for an indefinite period. So far as the record discloses, it was an accident that the vessel came back to San Francisco when it did. By the shipping articles, the appellants could not quit the vessel until it returned to a port of the United States, and such return depended absolutely upon the will of the master. He had only to land at foreign ports, and keep the vessel away from the United States, in order to prevent the applicants from leaving his service."

In connection with the other consideration the following quotation is interesting: "The 13th Amendment, although tolerating involuntary servitude only when imposed as a punishment of crime of which the party shall have been duly convicted, has been construed, by the decision just rendered, as if it contained an additional clause expressly excepting from its operation seamen who engage to serve on private vessels. Under this view of the Constitution, we may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen. In former days, overseers could stand with whip in hand over slaves, and force them to perform personal service for their masters. While, with the assent of all, that condition of things has ceased to exist, we can but be reminded of the past when it is adjudged to be consistent with the law of the land for freemen who happen to be seamen to be held in custody that they may be forced to go aboard private vessels and render personal services against their will."

From the above it is seen that Justice Harlan did not believe that Congress, under its power over interstate and foreign commerce, could pass laws which would abridge the

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rights of seamen, any more legitimately that it could abridge the rights of any other class of workmen.

Along the same line with the case just discussed is the case of Geer v. Connecticut, 161 U. S. 519. In this case it was held that it is not unconstitutional for a State to forbid, under pain of fine or imprisonment, that its citizens ship game killed within the boundaries of the State to any point outside of the State. The ground for the decision was that a State may preserve the game for its own people. "The power of a state to protect by adequate police regulation its people against the adulteration of articles of food . . . although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never become the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for public good."

Justice Harlan dissented. He held that after a man has gained possession of killed game, it becomes his own, to deal with as he pleases. He said: "The game in question having been lawfully killed, the person who killed it and took it into his possession became the rightful owner thereof. This, I take it, will not be questioned. As such owner he could dispose of it by gift or sale, at his discretion. So long as it was fit for use as food, the state could not interfere with his disposition of it, any more than it could interfere with the disposition by the owner of other personal property that was not noxious in its character. To hold that the person receiving personal property from the owner may not receive it with the intent to send it out of the state is to recognize an arbitrary power in the government which is inconsistent with the liberty belonging to every man, as well as with the rights which inhere in the ownership of property. . . . Believing that the statute of Connecticut, in its application to the present case, is not

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consistent with the liberty of the citizen or with the freedom of interstate commerce, I dissent from the opinion and judgment of the court."

The last case to be mentioned involving freedom of contract in interstate commerce is that of Smith v. St. Louis and S. W. R. Co., 181 U. S. 248. Here was brought into question the constitutionality of a statute of Louisiana—a quarantine law—which forbade any shipment of cattle of any description from Texas into Louisiana, or from Louisiana into Texas, because of the existence of anthrax among the animals of Texas. The court sustained the law as a valid police regulation.

Justice Harlan, with whom concurred Justice White, objected to the sweeping scope of the law. Its inclusiveness, according to him, made undue restrictions upon interstate commerce. "The grounds of my dissent are these: (1) The railroad company was bound to discharge its duties as a carrier unless relieved therefrom by such quarantine regulations under the laws of Texas as were consistent with the Constitution of the United States. It could not plead in defense of its action the quarantine regulations adopted by the state sanitary commission and the proclamation of the governor of that state, if such regulations and proclamation were void under the Constitution of the United States. (2) The authority of the state to establish quarantine regulations for the protection of the health of its people does not authorize it to create an embargo upon all commerce involved in the transportation of live stock from Louisiana to Texas. The regulations and the governor's proclamation upon their face showed the existence of a certain cattle disease in one of the counties of Texas. If, under any circumstances, that fact could be the basis of an embargo upon the bringing into Texas from Louisiana of all live stock during a prescribed period, those circumstances should have appeared from the regulations and the proclamation referred to. On the contrary, there does not appear on the face of the transaction any ground whatever for estab-

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lishing a complete embargo for any given period upon all transportation of live stock from Louisiana to Texas."

In other words, Justice Harlan could not see that there were sufficient grounds to cause the discontinuance of all shipments of cattle into Texas because of disease there. He could not see how sending cattle from Louisiana into Texas would bring disease from Texas into Louisiana, and hence he thought that such a restriction was an improper burden upon interstate commerce.

In considering the attitude of Justice Harlan to freedom of contract as a whole, the conclusion is inevitable that he was more liberal on this point than on almost any other. He magnified individual freedom greatly, and in so doing seemed to lose sight at times of the real working of the law. For instance, in Hooper v. California a doctrine such as he upheld would in practice have displaced the accepted position of insurance policies, and would have forced them into a rather anomalous category. They would not have been articles of commerce, and at the same time could not be subjected to effective regulation by the States. Thus they would have tended to slip out from under both national and state control.

Employers' Liability.—The case of Howard v. Illinois Central R. Co., 207 U. S. 463, brought before the Supreme Court the constitutionality of a statute of Congress, passed June 11, 1906, making employers liable for the injury or death of employees on railroad trains. That was the first employers' liability act passed by Congress, and was held to be unconstitutional as an attempt on the part of Congress to regulate intrastate as well as interstate commerce. The court spoke as follows: "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforceable."

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Justices Moody, Harlan, Holmes, and McKenna dissented from this opinion. They asserted that though the statute could be so read as to make it include matters that were without the power of the general government to regulate, a narrower reading could and should have been given to it so as to make it constitutional. Justice Moody rendered an able dissent from this case, and Justice Harlan concurred in his views, but also gave a short dissenting opinion of his own. He said: "We do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply only to cases of interstate commerce and to employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the State in which the wrong or injury occurred."

Beginning of the Interstate Commerce Commission.— There are two significant cases in which Justice Harlan differed from the court in its review of decisions rendered by the Interstate Commerce Commission. The first was the case of Texas and Pacific R. Co. v. Interstate Commerce Commission, 162 U. S. 197. Here the question was whether under the Interstate Commerce Act the railroad company could legally charge a cheaper rate for shipments of goods from foreign ports through the territory of the United States than it did between two equally distant places within the United States. The commission held that there had been an unlawful discrimination. In the Supreme Court it was argued that the Interstate Commerce Commission had erred in interpreting the statute of Congress by not considering circumstances which would have justified the railroad companies in making the distinction. The special circumstances under which they claimed justification were that since the freight vessels charged a cheaper rate for delivering goods from foreign ports to points along the Pacific coast, they were justified in putting the railroad rates so low

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as to draw the shipments over the land. This contention the Supreme Court upheld, reversing the decision of the circuit court: "The mere fact that the disparity between the through and local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity." The case had been contested at the instigation of chambers of commerce.

As would naturally be supposed, Justice Harlan's contention was that such a decree legitimised partiality to foreign shippers as opposed to those at home. He contended that the Interstate Commerce Commission gave the only proper interpretation of the act of Congress, either as to its meaning or as to the intent of the legislators. He said: "If such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise and labor, is consistent with the act of Congress, then the title of that act should have been one to regulate commerce to the injury of American interests and for the benefit of foreign manufacturers and dealers."

He said further: "I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendants' railroad. The consumers at San Francisco, those who may be supplied from that city, have no concern whether the goods reached them by the way of railroad from New Orleans, or by water around Cape Horn, or by route across the isthmus of Panama."

The last and most significant case regarding the early

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powers of the Interstate Commerce Commission is that of the Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144. This again was a case in which it was held that the commission had not given weight to material considerations.

The town of Troy, Alabama, claimed that it was discriminated against in railroad rates. On phosphate rock from a certain point to Troy the charge was $3.22 a ton, while from the same point to Montgomery, a longer distance, the charge was only $3 a ton. A similar rate was charged on cotton and various other commodities. Upon appeal to the Interstate Commerce Commission this was held to be discrimination, and the rates were ordered to be reduced to a certain point. Because of this reduction the case was taken by the railroad company into the circuit court of appeal, where the decision of the commission was overthrown, whereupon the commission appealed to the Supreme Court. The Supreme Court decided that in attempting to fix rates the commission had exceeded the powers granted to it by Congress. Furthermore, the court in this case went further than to attempt to determine whether the commission had rightly interpreted the statute of Congress. It justified this conduct by asserting that it had to investigate the circumstances in order to answer the question put by the Interstate Commerce Commission. It had been asked by the commission whether or not the decision made by the commission was right, and since the decision rested on the facts, the court had to investigate the facts to decide whether the commission had exceeded its jurisdiction or not. Having done this, it decided that the commission had exercised a power which it did not have, and furthermore asserted that the circumstances required a higher rate than the commission had set, hence the decision of the commission remained overthrown.

Justice Harlan disagreed with this decision because it apparently deprived the Interstate Commerce Commission of its ability to prevent discrimination in rates. He said:

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"The Commission was established to protect the public against improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports and issue protests. But it has been shorn by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce."

But however condemnable a situation may, for the time being, seem to be, it appears that somehow things right themselves in a government which is responsible to a healthy public opinion. At that time one of the most significant steps that had been taken to assure honest railroad rates must have seemed to Justice Harlan to have been blocked. The delay proved, however, to be only temporary, for since the above case was decided Congress has thought it wise so to amend the act establishing the Interstate Commerce Commission as to give it the power which the court in this case said that it did not have. In other words, Congress has said that it did mean to say what the court said that it did not mean to say, and what Justice Harlan contended was the only thing that it could very well have meant to say, namely, that the commission should determine what are fair rates for interstate lines to charge for the various articles of transportation.

Although the court alluded to the fact that the granting of the rate-making power to the Interstate Commerce Commission might be considered a delegation of legislative power, no definite point was made of it. This consideration did not seem to Justice Harlan to be a serious obstacle in the way of granting such a power to the Commission. Since the later amendment to the act of Congress, however, the judges seem to be unanimous in indicating that they do not consider this a delegation of the legislative power.

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CHAPTER V

Equal Protection of the Laws

Race.—In discussing the question of the equal protection of the laws in reference to the negroes it will be necessary to bring into consideration cases which might have been dealt with exclusively under other subjects. There are seven cases in which this vexed question has arisen in one way or another: (1) The Civil Rights Cases, 109 U. S. 3; (2) Louisville, New Orleans and Texas R. Co. v. Mississippi, 133 U. S. 587; (3) Plessy v. Ferguson, 163 U. S. 537; (4) Giles v. Harris, 189 U. S. 475; (5) Hodges v. United States, 203 U. S. 1; (6) Berea College v. Kentucky, 211 U. S. 45; (7) Bailey v. Alabama, 219 U. S. 219.

The first determined the position which the negroes should occupy in the States after the adoption of the thirteenth and fourteenth amendments, that is, that they should be citizens of the States and not wards of the nation. The second involved the constitutionality of the so-called Jim Crow laws from the standpoint of interstate commerce. The third passed upon the Jim Crow laws under the general provisions of the thirteenth and fourteenth amendments. The fourth refused to pass upon the constitutionality of the so-called disfranchisement provisions in the constitution of Alabama. The fifth and seventh involved the constitutionality of certain acts which were claimed to allow peonage in some of the Southern States. The sixth involved the constitutionality of a state law forbidding admission of negroes to Berea College, Kentucky. In every case the negro was denied the rights which he claimed.

The Civil Rights Cases will be discussed in more detail than the others, for in them is found the heart of the question as to the position which the negro was to occupy after

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the passage of the thirteenth and fourteenth amendments. There were five of these cases, but only four of them involved the main question. Two cases arose because of the refusal to admit negroes to hotels and two on account of the refusal to admit negroes to theatres on the same footing as other people; the other arose out of the refusal of a railway conductor to allow a colored woman to ride in the ladies' car. The contention of the plaintiffs was that these denials constituted violations of sections 1 and 2 of an act of Congress known as the Civil Rights Act, passed March 1, 1875, as appropriate legislation to enforce the rights which the negroes had acquired under the newly added amendments. The question, therefore, was whether the sections of the act were constitutional.

The argument of the court in declaring the sections unconstitutional may be summarized as follows: (1) In reply to the contention that the power of Congress to pass such a law was granted by the fourteenth amendment, the statement was made that, similar to the requirement that no State should pass any law impairing the obligation of contracts, it was state action of a particular character that was prohibited, and that individual invasion of individual rights was not the subject-matter of the amendment. A differentiation was thus made between the legislative powers of Congress under these amendments and those derived from the provisions of the Constitution which clothe Congress with plenary power of legislation over the whole subject-matter, as, for example, the regulation of interstate commerce. "In these cases, Congress has power to pass laws regulating subjects specified in every detail, and the conduct and transactions of individuals in every respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibitions against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily

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be corrective in character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of State officers."

(2) Such legislation by Congress was not needed for the enforcement of the thirteenth amendment because that amendment is self-executing. "By its own unaided force and effect, it abolished slavery, and established universal freedom. Still legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter and in spirit, and such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition on state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." The court admitted, therefore, that Congress had the right to pass any appropriate legislation for the obliteration and prevention of slavery, but denied that the refusal of admission to accommodations and privileges in all inns, public conveyances, and so on, subjected those persons to any form of servitude, or tended to fasten on them any badges of slavery. "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who apply in good faith for them. If the laws themselves make any unjust discrimination, amenable to the 14th Amendment, Congress has full power to afford a remedy, under that Amendment and in accordance with it."

It is seen, therefore, that the argument of the court rested in the first place on the assumption that the fourteenth

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amendment gave Congress only the power of passing corrective legislation directed at state action, and that since the act in question was directed against individuals it could not be considered appropriate legislation for the enforcement of the provisions of the fourteenth amendment. In the second place, it was not appropriate legislation for the enforcement of the thirteenth amendment, for it had been aimed at some things which the appellants had attempted to characterize as badges of slavery, but which could not be termed such.

Justice Harlan's contentions in dissenting from these views may be briefly given as follows: First, he held that the freedom established by the thirteenth amendment involved more than exemption from actual slavery. It meant more than simply preventing one person from owning another as property. The people, in adding the thirteenth amendment to the Constitution, could not have intended to destroy simply the institution of slavery and then remit those who had been set free to the States which had held them in bondage, and expect those States to protect them in the rights which necessarily grew out of the freedom which those States did not desire them to have. "I do not contend that the 13th Amendment invests Congress with authority, by legislation, to define and regulate the entire body of civil rights which citizens enjoy, or may enjoy in the several States. But I hold that since slavery, as the court has repeatedly declared . . . was the moving force or principal cause of the adoption of that Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races."

Second, he held that it was not for the judiciary but for Congress to say what was appropriate legislation for the enforcement of the thirteenth and fourteenth amendments. "Under given circumstances, that which the court charac-

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terizes as corrective legislation might be deemed by Congress as appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate; that is, the best adapted to the end to be attained."

Another quotation along this same line will be pertinent: "With all respect for the opinion of others, I insist that the National Legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the master of fugitive slaves. If fugitive slave laws providing modes, and prescribing penalties whereby the master could seize and recover his fugitive slave, were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that,—under an express power by appropriate legislation, to enforce a Constitutional provision granting citizenship—it may not, by means of direct legislation, bring the whole power of this Nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair or deny rights confessedly secured by the supreme law of the land?"

This gives an insight into the most significant points developed by Justice Harlan. Other considerations were urged by him, but they were of less importance than these. His doctrine might be stated as follows: (1) Admission to hotels, places of amusement, and so forth, on equal footing with other citizens was a right that could not be denied to citizens without infringing their freedom; hence such refusals constituted badges of slavery, and could be punished under the section of the thirteenth amendment which gives Congress the right to enforce by appropriate legislation the provision against slavery or involuntary servitude. (2) It was absurd to take the slaves out of the hands of the

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States, and soon thereafter give them back as free men to these same States, and expect them to be protected in their civil rights. The nation could not have meant to do so illogical a thing. And as simply the protection of the civil rights of negroes—or those who were once slaves—did not mean the taking by Congress of all civil rights of other citizens into its charge, such protection did not materially alter the nature of our institutions. No such alteration was intended by the newly added amendments. (3) It was not intended that the court should say what is meant by appropriate legislation. If Congress saw in certain acts badges and incidents of servitude or violations of the fourteenth amendment, it was not for the court to say what legislation Congress might choose to pass to remedy that condition; and a pronouncement by the court against the condition was judicial legislation. (4) Precedent showed that before the war Congress had, under an implied power, legislated so that owners of slaves could retain possession of their slaves; under an expressed power Congress should be able to secure freedmen in the possession of their rights.

When a fair examination is made of the decision and the dissent, the conclusion is plain that legally there is as much ground for one opinion as for the other. By a restricted and somewhat narrower interpretation of the amendments in question, the opinion of the court is logically sound. Justice Harlan's arguments do not refute the arguments of the court. His view is broader in some ways, and is based on a different line of reasoning. Both are sound constitutional doctrines, and the question was simply which of the two the majority of the court espoused. They upheld the former, and, of course, the decision went contrary to Justice Harlan's opinion. But since in this case the court decided the question upon the ground that the legislation in the Civil Rights Act was directed against individual action and was not corrective of state legislation and hence was unconstitutional, it will be interesting to follow the opinions that have been delivered as regards state acts.

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next case is Louisville, New Orleans and Texas R. ... v. Mississippi, 133 U. S. 587. Since, however, this case was discussed fully under interstate and foreign commerce,[1] it need not be considered further at this point.

Probably the most typical case, after the Civil Rights Cases, that has arisen under the equal protection clause is that of Plessy v. Ferguson, 163 U. S. 537. This case also involved the constitutionality of a statute of a State requiring the separation of races on the trains. It was rested directly upon the equal protection clause, but brought into question the general purpose of the thirteenth and fourteenth amendments.

The court held the following opinion: (1) There was nothing to show that the statute required involuntary servitude: "A statute which implies merely a legal distinction between white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or to re-establish a state of involuntary servitude." (2) The statute was in no way in conflict with the fourteenth amendment: "The object of the amendment was undoubtedly to enforce absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinctions based on color, or to enforce social, as distinguished from political, equality, or as commingling the two races upon terms unsatisfactory to either. . . . We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power

[1] See pages 89–90.

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in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption." (3) The question as to the amount of negro blood necessary to stamp a person a negro was to be settled by the State. What the State pronounced in this regard would be held correct in the United States Supreme Court.

In opposition to these views Justice Harlan developed the following points: (1) The railroad, as a public highway, should not be directed or allowed to discriminate on account of race. "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of its citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent, not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by every one within the United States." (2) The thirteenth amendment does not permit the withholding or the deprivation of anything necessarily inhering in freedom. As that amendment had been found inadequate for the protection of the rights of those who had been in slavery, it was followed by the fourteenth, which added greatly to the dignity and glory of American citizenship. "Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country it was declared by the 15th Amendment that 'the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.'"

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The following quotation will give the gist of the dissent: "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude the white persons from railroad cars occupied by blacks, as to exclude colored persons from coaches assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. . . .

"I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom."

The next case, Giles v. Harris, 189 U. S. 475, involved various provisions in the constitution of the State of Alabama which operated to disfranchise the negroes. The case had been dismissed from the circuit court because damages to the amount of two thousand dollars were not averred. It was appealed to the Supreme Court of the United States, where the point as to the amount averred was waived, and the case was argued on its merits. Although the court showed that it was not within the power of equity to grant relief, and not possible to assure the right to vote to the colored people in face of the opposition of the white popu-

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lation, it did not pass upon the constitutionality of the provisions in question. This case is discussed more fully in the chapter on jurisdiction of court.[2]

The next two cases involve the question of peonage in the Southern States. Hodges v. United States, 203 U. S. 1, was a review of a judgment in a lower federal court "convicting individual citizens of compelling negro citizens, by force and intimidation, to desist from performing their contracts of employment." It came by writ of error to the United States district court of Arkansas, where the decision was that interference with citizens to such an extent as to prevent them from contracting for their labor as they pleased was forbidden by the thirteenth amendment to the Constitution of the United States. The Supreme Court said that such an interference was not sufficient to be pronounced involuntary servitude as the words are used in the thirteenth amendment.

The arguments in the decision of the Supreme Court may be stated as follows: By a strict definition of slavery and involuntary servitude it was held that the lack of power to make or perform contracts was not embodied within the meaning of the thirteenth amendment. "It is said, however, that one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contracts, they, to that extent, reduced those parties to a condition of slavery,—that is, of subjection to the will of the defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from assault and battery. He is entitled to hold his property safe from trespass or appropriation; but no mere per-

[2] See pages 170–172.

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sonal assault or trespass or appropriation operates to reduce the individual to a condition of slavery." Then follows a declaration that the thirteenth amendment did not intend to make the negroes wards of the nation, but only to give them citizenship and protect them against the abridgment of the privileges of citizenship by state action.

Justice Harlan did not agree with the arguments of the court in any particular. He claimed that a conspiracy forcibly to prevent citizens of African descent from contracting for their labor as they pleased infringed or violated a right or privilege, created by, derived from, or dependent upon the Constitution of the United States, because (1) the infringement of the right to contract for one's own labor is, within the meaning of the Constitution, slavery; (2) the thirteenth amendment not only abolished slavery, but authorized Congress to make this abolition effective by appropriate legislation; (3) Congress had passed such appropriate legislation by Par. 5508 of the Revised Statutes, which had been declared constitutional by the Supreme Court.

As is shown in another chapter, the case of Bailey v. Alabama, 211 U. S. 452, was dismissed on a technicality. This case is discussed elsewhere.[3] It is sufficient to say here that Justice Harlan in his dissent argued that the contention of the court was not well founded, and that the failure of the court to pass upon the constitutionality of the statute in question permitted discriminatory legislation.

Berea College v. Kentucky, 211 U. S. 45, involved the constitutionality of a law of Kentucky making it unlawful for negroes and whites to attend the same schools. In the Supreme Court this law was upheld as regarded its operation upon Berea College, a corporation of the State.

As will be shown later, Justice Harlan believed that a State had the right to prevent any corporation from entering its borders, but after a corporation had begun to do business there he did not think that because of this right the

[3] See pages 164–166.

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State could impose any restriction it might please. This doctrine of his, combined with his strong desire to see the colored people get justice, brought forth a stinging dissent from him in the Berea College case. The spirit of his dissent here is not materially different from that in the other cases on this subject. The following quotation is typical: "In the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."

Justice Harlan's doctrine as to the position which the negroes should be allowed to occupy in our country may be stated as follows: He believed that they should occupy the position that historically they were intended to occupy by the thirteenth and fourteenth amendments. He believed that the law should be interpreted as it was meant and not as the court thought expedient and wise. Though it may be true that his relation to the negro in political matters may have made him more violent in his dissents, any one who will look fairly at the question must conclude that his doctrine was legally correct. And as time passes, and as both classes become better educated and broader in their views, it may be said that the tendency of the court is likely to be to interpret the laws largely as he thought they should have been interpreted, that is, as historically they were meant.

There are two cases representative of Justice Harlan's doctrine regarding legislation as to the Chinese immigrants in this country. They are Baldwin v. Franks, 120 U. S. 678, and United States v. Jung Ah Lung, 124 U. S. 621.

The first involved the following points: A group of men in California drove a Chinaman from his home and forbade his doing business in the town in which he had set up his laundry. These men were arraigned before the United

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States circuit court and punished for having violated certain sections of the Civil Rights Act. Appeal was made by Baldwin upon writ of error to the Supreme Court of the United States, and here the decision of the circuit court was reversed.

In this case there were several questions to be answered, the most important of which was whether such acts were in violation of the following provisions of the revised statutes of Congress, being portions of the well-known Civil Rights Act: Sections 5508, 5519, and 5536. If they were violations of any of these sections, was the decision below constitutionally correct? In each point the court held as follows: The intent of Section 5519 was to impose a fine upon any person or group of persons who go upon the premises of another for the purpose of depriving him of the equal protection of the laws. That of Section 5508 was to make it criminal for two or more persons to threaten or in any way intimidate any citizen in the enjoyment of the rights secured to him by the Constitution. That of Section 5536 was to impose the same fine upon persons conspiring to destroy or hamper the force of the government of the United States. Section 5519 had already been declared unconstitutional, but the question was raised whether the same ruling would hold regarding aliens. The court held that the statute was not so worded as to be applicable to aliens. Section 5536 was likewise declared invalid. Section 5508, however, had been repeatedly declared constitutional. The question was, therefore, did this section apply to this particular case? The court answered this question by saying that the statute applied to *citizens* and not to *persons*, therefore it could not have been meant to apply to aliens.

The following quotation from Justice Harlan's dissent will indicate his answers to the arguments of the court: "It would seem from the decision in this case, that if Chinamen, having a right, under treaty, to remain in our country, are forcibly driven from their places of business, the Government of the United States is without power in

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its own courts to protect them against such violence, or to punish those who, in this way subject them to ill treatment. If this be so, as to Chinamen lawfully in the United States, it must be equally true as to citizens, or subjects of every other foreign Nation, residing or doing business here under the sanction of treaties with their respective governments. I do not think that such is the present state of the law."

In reference to the assertion of the court that the act did not apply to aliens, he said that since further on in the act the word "another" instead of "citizen" occurred, Congress must have had in mind any other person, whether a citizen or not.

He again contended that in spite of the previous decisions regarding Section 5519, it was constitutional as appropriate legislation to secure rights guaranteed under the thirteenth and fourteenth amendments. "If Congress, upon looking over the whole ground, determined that an effectual and appropriate mode to secure such protection was to proceed directly against a combination of individuals, who sought, by conspiracy or by violent means, to defeat the enjoyment of the right given by the Constitution, I do not see upon what ground the court can question the validity of legislation to that end." That is, of course, but a reiteration of his disapproval of the declaration of unconstitutionality in the Civil Rights Cases. Justice Harlan's dissent from this case, therefore, was simply a call to the nation to stand by its treaty obligations to aliens regardless of race or other considerations.

The case of the United States v. Jung Ah Lung contains what appears to be a departure from Justice Harlan's usual mode of dissent, but a close examination shows that it was not a departure. The case in question came up from the United States circuit court for the district of California. It was an appeal to review the decision of this court issuing a writ of habeas corpus to immigration authorities who held a Chinaman because of his inability to produce a cer-

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tificate which would have shown that he was a laborer in this country prior to the passage of the Chinese exclusion acts, and which would have, therefore, given him the right to readmission into this country. It appeared that Jung Ah Lung had been captured by pirates and had been robbed of this certificate, which according to the law he was required to produce before he could be allowed to reenter this country. The circuit court denied the claim of the immigration officials that their decision was final, and gave the Chinaman a hearing.

As it appeared from other evidence satisfactory to the court that he was the same man to whom this certificate had been issued, and that, in the light of every consideration except the production of the certificate, he was entitled to enter, the circuit court ordered his release. This order the Supreme Court of the United States upheld.

Justice Harlan, with Justices Field and Lamar concurring, contended that the action of the circuit court was wrong. The law expressly stated that the certificate should be produced, and admission without it was illegal. The reason for their contention was, in the first place, that admission through one port ought not to have been allowed on any condition that could not be allowed in another port. Immigration laws in order to be constitutional must be uniform. Since the defendant could not have been admitted under the same circumstances through any port except the one from which he departed, he ought not to have been admitted through that one.

In the second place, since the law read that "said certificate shall be the only evidence permissible to establish his right to re-enter," the court did not have a right to accept any other evidence. "If appellee's certificate was forcibly taken from him by a band of pirates, while he was absent, that is his misfortune. That fact ought not to defeat what was manifestly the intention of the legislative branch of the Government. Congress, in the Act of 1882, said, in respect to a Chinese laborer who was here when the

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treaty of 1880 was made, and who afterwards left the country, that the 'proper evidence' of his right to go and come from the United States was the certificate he received from the collector of customs at the time of his departure, and that he should be entitled to re-enter 'upon producing and delivering such certificate' to the collector of customs of the district at which he seeks to re-enter; while this court decides that he may re-enter the United States without producing such certificate, and upon satisfactory evidence that he once had it, but was unable to produce it. As by the very terms of the act, a Chinese laborer, who was here on November 17, 1880, is not excepted from the provision absolutely suspending the coming of that class to this country for a given number of years, unless he produces to the collector the certificate issued to him, we cannot assent to the judgment of the court."

The loss of that certificate would seem to be similar to the loss of a ticket of any kind. As a matter of practice no one assumes that if a person has lost his ticket he will be allowed to ride on a train or go to a theatre. In the same way there seems to be no reason why any one should have assumed that a Chinaman could have been readmitted to this country without his certificate of admission.

There is one case of particular interest regarding attempts at discrimination against Indians. There seem to be few attempts to deny the equal protection of the laws to them, and this is an interesting fact in its relation to race prejudice. Though it must be admitted that the Indians have not at all times been fairly dealt with in other respects by the white people, it cannot be said that the race prejudice against them has been strong. It is an interesting observation that the presence of any white blood in their veins tends to classify them as white rather than red men; and people possessing Indian blood are often proud of the fact.

The case in question, however, does contain an element of denial of the equal protection of the laws. The case is Elk v. Wilkins, 112 U. S. 94. It came by writ of error

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from the United States district court for Nebraska, and arose because of the fact that a registration officer had denied to the Indian the right to register as an elector of the city of Omaha. Elk, the Indian, had severed his tribal connections, and had taken up his abode among the white citizens of Nebraska. Having been denied the right to vote, and the necessary requirements being present for the recognition of the suit by the district court, he entered suit against Wilkins, the registration officer, on the plea that he had been denied rights granted to him under the fourteenth and fifteenth amendments of the United States Constitution,—under the fourteenth amendment in that he was born in the United States and hence was a citizen thereof, and under the fifteenth amendment in that he had been denied the right to vote because of race. The lower court decided against him, and the decision was sustained in the Supreme Court.

The reason for this decision was that Indians could not become citizens except through the regular process of naturalization. Since this process had not been complied with, the Indian in question was not a citizen. Nor did the fact that he was born in the United States alter the situation. The reason for such a decree was the fact that Congress had in all respects dealt with the Indians as if they were aliens, and had passed no statute making citizens of them. Hence the denial of the right to vote did not need to be considered.

Justice Harlan in his dissent established the fact that the Indian in question had taken up his abode in the State in such a way as to be subject to taxation. This point established, he showed that the words "excluding Indians not taxed" as inserted in the fourteenth amendment recognized that there were a number of Indians in the States who were taxed, and that these were not excluded from citizenship, but were impliedly included. From this, therefore, he concluded that Indians in the position which Elk occupied were recognized as citizens by the fourteenth amend-

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ment. This assertion he reinforced by showing by quotations that the men who drew up the amendment meant it that way. Furthermore, he showed that in the act of Congress passed in 1886 regulating the relations with Indians the same phrase was used and with the same meaning.

The following conclusion is significant: "Born, therefore, in the territory, under the dominion and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the States, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming subject by residence in one of the States to the complete jurisdiction of the United States, then the 14th Amendment, has wholly failed to accomplish, in respect to the Indian race, what we think was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our country, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges or immunities of citizens of the United States."

It may be noted that this situation was alleviated by an act of Congress, passed in 1887, which made citizens of such men whether they wished citizenship or not.

Corporations.—Since the case of Paul v. Virginia, 8 Wall. 168, which determined the fact that corporations are citizens in the constitutional sense, was decided prior to Justice Harlan's appointment as associate justice, it is not possible to say what would have been exactly his view on this subject. There is, however, in the case of Atchison, Topeka, and Santa Fé R. Co. v. Matthews, 174 U. S. 96, an interesting expression of his opinion on this general subject, but since this case did not present the question squarely to the court, his constitutional doctrine on the subject cannot be deduced.

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This case came from the supreme court of Kansas, and involved the constitutionality of a statute of that State which required that a railroad company, in case of suit for damages against it by an injured person, should pay, in addition to the damages awarded by the court, the attorneys' fees of the plaintiff. One of the questions raised was whether the statute did not discriminate against the railroad company in that it stipulated that the company should pay the fees if the suit went against them, and did not force the plaintiffs to pay the fees if the suit went in favor of the company. The court, nevertheless, upheld the statute on the ground that the classification was just in that it was made because of the nature of the business, the railway business being one which people enter at their peril.

Though Justice Harlan's argument in this case may not seem fair, it is extremely interesting. After reviewing the decision in Gulf, Colorado and Santa Fé R. Co. v. Ellis, 165 U. S. 150, he said: "If the opinions in the *Ellis Case* and in this case be taken together, the state of the law seems to be this:

"I. A state *may not* require a railroad company sued for negligently killing an animal to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, when it does not allow the corporation when its defense is sustained to recover a like attorney's fee from the plaintiff.

"2. A state *may* require a railroad company sued for and adjudged liable to damages arising from fire caused by the operation of its road, to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, even if it does not allow the corporation when successful in its defense to recover a like attorney's fee from the plaintiff. . . .

"Having assented in the *Ellis Case* to the first proposition, I cannot give my assent to the suggestion that the second proposition is consistent with the principles there laid down. Placing the present case beside the former

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case, I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute be unconstitutional."

This gives the main contention in his dissent. But there is another that should be noted, namely, that the statute did not apply to all corporations, but only to railroad companies: "Taken in connection with the principles of general law recognized in that state, that statute, although not imposing any special duties upon railroad companies, in effect says to the plaintiffs, Matthews and Trudell, the owners of the elevator property—indeed it says in effect to every individual citizen, and for that matter every corporation in the state: 'If you are sued by a railroad corporation for damages done to its property by fire caused by *your* negligence, or in the use of *your* property, the recovery against you shall not exceed the damages proved and the ordinary costs of the suit. But if your property is destroyed by fire caused by the operation of the railroad belonging to the same corporation, and you succeed in an action brought to recover damages, you may recover, in addition to the damages proved and the ordinary costs of suit, a reasonable attorney's fee; and if you fail in such action no attorney's fee shall be taxed against you.' In my judgment, such discrimination against a litigant is not consistent with the equal protection of the laws secured by the Fourteenth Amendment."

When it is considered what the court really did in these two cases, there is small wonder that there was objection on the part of some one. In one instance a Texas statute had been declared unconstitutional in a suit in which an individual had sought the benefit of its operation, while in the second instance a partnership firm had been granted the protection of the same sort of law that had been declared unconstitutional in Texas.

One of the most significant cases on the subject of taxation of corporations, the Fire Association of Philadelphia

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v. New York, 119 U. S. 110, came by writ of error from the supreme court of New York. A law of New York required that a fire-insurance corporation chartered in another State should pay a greater tax than domestic corporations did. The question to be answered was whether the statute was unconstitutional in that it denied to such corporations the equal protection of the laws.

The argument of the court in this case can best be given in a single quotation: "The Pennsylvania corporation came into the State of New York to do business, by the consent of the State, under the act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by the statute. The State having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, . . . and the foreign corporation until it pays such license fee is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The Act of 1865 had been passed when the corporation first established an agency within the State. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own State might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisites as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the new provisions, such a consent could not be given until the tax, as a license fee for the future, should be paid."

Thus it is seen that the argument of the court was, briefly,

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this: Since a corporation is a citizen in a different sense from an ordinary person, different requirements may be made for it. Since a State may forbid a corporation to do business at all within its limits, it may put any restrictions it pleases upon its doing business there.

Justice Harlan agreed that a State had a right to exclude a corporation from its bounds, but he would not accept the added corollary that the State could, because of this power of exclusion, subject the corporation doing business within its limits to any restrictions it might choose.

He said: "Even if it were conceded that a State, which provides for the organization, under her own laws, of corporations for the transaction of every kind of business, could arbitrarily exclude from her limits similar corporations from the remaining States, and declare all contracts made within her jurisdiction with corporations from other States, to be void—concessions to be made only for the purposes of this case—it would not follow that she could subject corporations of other States, doing business within her limits under a license from the proper department, to higher taxes than she imposes upon other corporations of the same class from the remaining States."

Coming more nearly to the point at issue, he said: "The denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community. So, a corporation is denied that protection when its property is subjected by the State, under whose laws it is organized, to more burdensome taxation than is imposed upon other domestic corporations of the same class. So, also, a corporation of one State, doing business, by its agents, in another State by the latter's consent, is denied the equal protection of the laws, if its business there is subjected to higher taxation than is imposed upon the business of like corporations of

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other States. These propositions seem to me to be indisputable. They are necessarily involved in the concession that corporations, like individuals, are entitled to the equal protection of the laws."

He said further: "It would seem to me to be the result of the decision in this case, that New York may prescribe such varying rates of taxation upon insurance corporations of the remaining thirty-seven States, within her jurisdiction, as she chooses—the rate for corporations from each State differing from the rate established for corporations of the same class from all other States, and the rate in respect to corporations of other States being higher than she imposes upon her own corporations of the same class. Such legislation would be a species of commercial warfare by one State against the others, and would be hostile to the whole spirit of the Constitution, and particularly the Fourteenth Amendment, securing to all persons within the jurisdiction of the respective States the equal protection of the laws."

In this case is seen the first promulgation of Justice Harlan's doctrine that wherever a corporation has a right to do business it has a right to the equal protection of the laws. His reason for holding to this doctrine is well stated in the last quotation given, namely, that if such discrimination were allowed it would give rise to a condition of commercial warfare that would be unwholesome in many ways.

This same doctrine was announced in his dissent from People, ex rel. Parke, Davis, and Co. v. Roberts, 171 U. S. 658. This case, however, presented the question in a slightly different form. Here arose the question of the constitutionality of a statute of the State of New York which imposed a higher tax on corporations which manufactured their goods outside of the State and sent them there to be sold than was imposed on either New York or out-of-the-State corporations which operated plants within the State. The claim was made by Parke, Davis, and Company, an out-of-the-State corporation which wished to do

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business in the State of New York without setting up an establishment in the State, that this law was unconstitutional in that it denied to them the equal protection of the laws.

A brief quotation will make clear the argument of the court: "It is said that the operation of that portion of this taxing law, which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."

Justice Harlan's reply to this assertion is very convincing. He said, after an extended discussion of previous cases: "I am unable to reconcile the opinion and judgment in the present case with the principles announced in the above cases. A tax upon the capital employed by a manufacturing corporation or company is *pro tanto* a tax upon the goods manufactured by it. If this be not so, there are many expressions in the former opinions of this court which should be withdrawn or modified. A corporation or company wholly engaged in manufacture in New York has an advantage, in the sale of its goods in the markets of that state, over a corporation or company manufacturing like goods in other states, if the former is altogether exempted from taxation in respect of its franchise or business, and the latter subjected to taxation of its franchise or business, measured by the amount of its capital employed in New York. That state may undoubtedly tax capital employed within its limits by corporations or companies of other states, but it cannot impose restrictions that will necessarily prevent such corporations or companies from selling their goods in New York upon terms of equality with corporations or companies wholly engaged there in manufacturing goods of like kind. . . . In my judgment, this statute cannot

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be sustained in its application to the plaintiff in error without recognizing the power of New York, so far as the Federal Constitution is concerned, to enact such statutes as will by their necessary operation amount to a tariff protecting goods manufactured in that state against competition in the market there with goods manufactured in other states. And if such legislation as is embodied in the statute in question is held to be consistent with the Federal Constitution, why may not New York, while exempting from taxation the franchises or business of corporations or companies wholly engaged in carrying on their manufacturing in that State, put such taxation upon the franchise or business of corporations or companies doing business in that State, but not wholly engaged in manufacture there, as will amount to an absolute prohibition upon the sale in New York of goods manufactured in other states? . . . I had supposed that the Constitution of the United States had established absolute free trade among the States of the Union, and that freedom from injurious discrimination in the markets of any state, against goods manufactured in this country, was a vital principle of constitutional law."

The case of Fidelity Mutual Life Insurance Co. v. Mettler, 185 U. S. 308, contains a similar point. In this case the court upheld a statute of Texas which directed that life and health insurance companies which should default in the payment of their policies should pay as damages, in addition to the face of the policy, twelve per cent of the original amount, together with reasonable attorneys' fees that might have been made necessary in the collection of the money due to be paid. The claim was made that this statute was unconstitutional in that it discriminated against health and life insurance companies as opposed to other insurance companies, and therefore denied to them the equal protection of the laws. The court held that the statute was constitutional in that it was a condition imposed by a State upon the right of a corporation to do business within its borders.

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In his dissent from this case is stated even more clearly Justice Harlan's doctrine as to the constitutional rights of a corporation doing business in any State: "It is one thing for a state to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a state to admit or license foreign corporations to do business within its limits, and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its licence or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business in the state, and, whether constitutional or not, must be respected by the corporation. Corporations created by the several states are necessary to the conduct of the business of the country; and it is a startling proposition that a state may permit a corporation to do business within its limits, and by that act acquire the right to subject the corporation to regulations that may be inconsistent with the supreme law of the land."

It was a good while, however, before the other members of the court seemed to see his point. They had gone on the assumption that a whole is the sum of its parts, whereas the proposition which they were facing was not one of geometry, but of business. The analogy did not, therefore, hold. In the case of Western Union Telegraph Co. v. Kansas, 216 U. S. 1, they finally saw this, and Justice Harlan was himself called upon to deliver the opinion of the court. He found opportunity to express in an affirmative way his long cherished doctrine: "The exaction from a foreign telegraph company for the benefit of the permanent school fund, under the authority of Kan. Gen. Stat. 1901, p. 280, of a 'charter fee' of a given per cent of its entire authorized capital stock,

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as a condition of continuing to do local business in the state, is invalid under the commerce and due-process-of-law clauses of the Federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the state." Though this decision was delivered under the commerce and due process clauses, and not under the equal protection provision, the principle was the same.

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CHAPTER VI

Jurisdiction of Courts

Removal of Suits.—The question seems to be settled that if a case has been decided in a state court it is then too late to remove it into a lower federal court. But some very interesting points come up in determining when the question at issue in a suit may be termed res judicata. A typical instance of this kind occurred in the case of Congress and Empire Spring Co. v. Knowlton, 103 U. S. 49. Here the Supreme Court affirmed a decision of the United States circuit court for the northern district of New York, which had asserted that money paid on an illegal contract could on certain conditions be recovered. The suit might have been brought in the federal court because of diversity of citizenship, and the question before the Supreme Court was whether there was sufficient evidence that the case had been decided in the New York court to prevent the lower federal court from taking jurisdiction and deciding the case regardless of any other decision. The Supreme Court said that there was not, but Justice Harlan said that there was.

The reason why the court held that this suit had not been decided was that there was not sufficient evidence on the record to show that fact. "It is suggested by the counsel for the plaintiff in error, that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and this court ought to consider the questions raised in this case as *res judicata.*

"The reply to this suggestion is, that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any court except the United States Circuit Court for the Northern District of New York, from which the case has been brought to this

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court on error. We cannot consider facts not brought to our notice by the record."

Justice Harlan knew that when the court desired to do so it sometimes considered facts not brought to its notice by the record, and he contended that on this occasion the evidence was sufficient. "It is, in my judgment," he said, "an immaterial circumstance, that the present transcript does not contain the proceedings had in the Commission of Appeals. An examination of the case reported in 57 N. Y. shows beyond question, that it is the identical case now before us; at any rate, that it was a case between the same parties who are now before us, and that it involved the same issues that are here presented for our determination. We know that the adjudication in that court was long prior to the removal of this case into the federal court. We know also that the questions decided in the Circuit Court, and which we are now asked to determine, have been once passed upon, between the same parties, in a court of competent jurisdiction. All this plainly appears upon the face of the decision reported in 57 N. Y. The defendants in error should not, therefore, be permitted to escape the legal effect of that decision by a removal of the case into the Circuit Court of the United States." This comment Justice Harlan had previously reinforced by the assertion that the "learned District Judge, who tried the case in the Circuit Court, opened his opinion, which is part of the transcript, with the statement that 'the case comes here by removal from the State court, after a decision adverse to the plaintiff by the Commission of Appeals, reversing the judgment of the Supreme Court in favor of plaintiff, and ordering a new trial.' He then proceeds to determine the case upon principles of law different from those announced by the Commission of Appeals."

Justice Harlan's contention here was that even if the record itself did not show that the case had been tried before, extensive evidence showing that the case had been tried should be accepted as determining the fact.

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Another case directly connected with the subject of removal is that of Fisk v. Henarie, 142 U. S. 459. Here the court decided that an application for removal into the United States circuit court was made too late. The case had been pending in the state courts from 1883 to 1887. It had been tried three times in the lower state courts with no satisfactory results. It had been appealed to the state supreme court and remanded to the lower courts for retrial, after which the case was held up and postponed so often that it was practically impossible to have a final judicial determination in the state courts.

The suit involved the amount of $60,000, and there was diversity of citizenship. The question at issue for the Supreme Court to decide was whether the Judiciary act of 1887, which sought to reduce the number of cases to be heard by the United States circuit court, so restricted the field as to make it impossible for the federal court to give relief. The syllabus of the case gives the decree of the court: "Under the Act of March 3, 1887, a cause may be removed from a state court into the U. S. Circuit Court at any time before the trial thereof, on the ground of prejudice or local influence; after a cause has been tried three times in the state court an application for removal is too late."

Justice Harlan's contention was that the setting of such a limit was contrary to what Congress meant by the statute passed in 1887. He thought that further procedure might be necessary before it could be ascertained whether local prejudice would thwart the dealing out of justice. "The fact of prejudice or local influence may be established by overwhelming evidence; still under the decision of the court, there can be no removal if the application for removal be not made before the first trial. We do not mean to say that when a trial is in progress that the cause may be removed before its termination, even upon the ground of prejudice or local influence. But, if at the time the application is made the cause is not on trial and is undetermined,

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that is, has not been effectively tried, the Act of 1887, in our judgment, authorizes a removal, on proper showing, upon the ground of prejudice or local influence, although there may have been a trial, resulting in a verdict which has been set aside. . . .

"Congress could hardly have intended to give the defendant citizen of another State simply the time between his answering or pleading, and the calling of his case for the first trial thereof, to determine whether he should apply for a removal upon the ground of prejudice or local influence. In our judgment, it meant to give the right of removal, upon such ground, at any time, when the case is not actually on trial, and when there is in force no judgment fixing the rights of the parties in the suit. If a case is open *for* trial, on the merits, an application for its removal before that trial commences is made 'before the trial thereof.' In our opinion, the interpretation adopted by the court defeats the purpose which Congress had in view for the protection of persons sued elsewhere than in the State of which they are citizens."

By contrasting the two cases discussed we may deduce Justice Harlan's doctrine that anything that has actually been decided is res judicata, but that which has not been decided is not res judicata. The length of time during which it has been pending is not to be considered, as long as the case is not actually on trial.

In the case of Railroad Co. v. Ide, 114 U. S. 52, the Supreme Court decided, curiously enough, that in a suit between a citizen or citizens of one State and a citizen or citizens of another State diversity of citizenship does not necessarily exist. In order that diversity of citizenship, within the meaning of the Constitution, shall exist, all the parties plaintiff or complainant must be of different citizenship from that of all of the defendants. The diversity must be complete. This doctrine Justice Harlan opposed. He dissented in Railroad Co. v. Ide without giving grounds for

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his dissent, but when the question came up again in Pirie v. Tvedt, 115 U. S. 41, he broke his silence. This case arose between citizens of Minnesota on the one hand and citizens of Illinois and of Minnesota on the other. The court held that this case was governed by that of Railroad Co. v. Ide, and that the diversity of citizenship was not such as could be termed diversity in the constitutional sense.

Justice Harlan asserted that there was diversity of citizenship, and that even if a decree could not be rendered against those parties who were citizens of Minnesota, it could be rendered against the citizens of Illinois. "Had the suit been only against the defendants who are citizens of Illinois, as it might have been, the right of the latter to remove it into the Circuit Court of the United States would not be questioned. But it seems, by the present decision, that their right of removal has been defeated by the act of the plaintiffs in waiting in uniting with them as defendants, citizens of Minnesota, against whom, as is conceded, it was not necessary to introduce any evidence whatever in order to entitle the plaintiffs to a judgment against the other defendants. As in most, if not in all States the local statutes dispense with the verification of the pleadings in action of tort, this convenient device will be often employed. When, for instance, a citizen of New York has a cause of action, sounding in damages, against a citizen of New Jersey, who happens to go within the jurisdiction of the former State, the plaintiff can join a citizen of New York as a co-defendant, charging them jointly with the liability to him for damages claimed. And when the citizen of New Jersey asks a removal of the suit to the federal court, he is met with the suggestion that it is for the plaintiff, in his discretion to sue him separately, or jointly with others. Upon his application to remove the cause, the state court may not institute a preliminary inquiry as to whether the plaintiff had, in fact, a cause of action against the defendant citizen of New York. It is not for that court, in advance, to determine the good faith of the plaintiff in making a citizen

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of New York a co-defendant with the citizen of New Jersey. The removal statutes make no provision for such an inquiry, and the state court, by the decision just rendered, must look alone to the course of action as set out in the petition or complaint. When, in the case supposed, the evidence is concluded, and it appears that there is, in fact, no cause of action against the defendant citizen of New York, it is too late for the removal to occur; for, it must be had, if at all, before the suit could be tried in the State court."

Justice Harlan opposed this differentiation in diversity of citizenship, which the court made, on account of a practical consideration as well as because of proper constitutional construction. He believed that diversity of citizenship ought not to have been so interpreted as to enable the unscrupulous to play with the law.

Another case in which arose the very interesting question as to what constitutes diversity of citizenship of corporations is St. Louis and San Francisco R. Co. v. James, 161 U. S. 545. Here one Etta James sued to recover damages for the death of her husband, who was killed while a fireman upon that railroad. She was a citizen of Missouri, and the railroad company was also a citizen of Missouri, being a corporation chartered by that State. She contended that inasmuch as the company was doing business under the laws of Arkansas it was also a citizen of that State, and that there was therefore diversity of citizenship. The court decided that a corporation could not be a citizen of two States at the same time, and since it was chartered in Missouri, the company was a Missouri citizen, and there was therefore no diversity of citizenship.

Justice Harlan dissented. According to his doctrine, a corporation could under certain conditions be considered a citizen of two States. Since in this case the railroad company had agreed to submit to the laws of Arkansas for the privilege of doing business there, and since the laws of that State stipulated that every railroad company that did busi-

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ness within that State, whether chartered elsewhere or not, should become a citizen of that State, this company had properly to be considered as a citizen of Arkansas as well as of Missouri, and if the Arkansas corporation was sued by a citizen of another State there was diversity of citizenship.

"At first blush," he says, "it may seem strange that the plaintiff did not sue the Missouri corporation in one of the courts of Missouri. But that cannot affect the jurisdiction of the court below, if the defendant is an Arkansas corporation. And her right to a judgment cannot be denied, if the Arkansas corporation is liable for injuries caused, in Missouri, by the negligence of the Missouri corporation. It may be that the line in Missouri is covered by mortgages for very large amounts, so that a judgment against the Missouri corporation would be of no real value. That perhaps is the reason why the plaintiff brought suit against the Arkansas corporation. But, as already said, this view is not at all material on the present hearing."

Closely allied to the matter of diversity of citizenship is the question as to where the suit may properly be brought. This point came out very emphatically in the case of Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501. Here was involved an attempt on the part of certain shippers of Georgia to prevent a conjoint action of several railroad companies to put into operation an increase in freight rates. The action was brought in the United States circuit court for the southern district of Georgia on the ground of diversity of citizenship. The court held that such a suit could not be conducted in the federal court for that district, and had to be brought in the district of one of the corporations. This decision was based upon the act of Congress of 1888, which, the court asserted, provided that "no civil suit shall be brought . . . in any other district than that whereof he [the defendant] is an inhabitant, but where the jurisdiction is founded only on the fact that the action

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is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Justice Harlan differed from the court as to its interpretation of the Act of 1888, and emphasized the lack of wisdom of the decree. In referring to the act he made the following comment: "I recognize the fact that the act of 1888 was not drawn with precision. But I am of opinion that, as the act gives the circuit court original jurisdiction, concurrent with the courts of the several states, 'of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000 . . . in which there shall be a controversy between citizens of different states,' the intention of Congress would be best effectuated by holding that the jurisdiction of the circuit court is not excluded, in a controversy between citizens of different states, simply because the plaintiff, who sued in the Federal court held in the state of his residence, asserts a Federal right and seeks to have it protected against the illegal acts of the defendant, a citizen of another state; provided, always, that the defendant, if a corporation of another state, may, through agents conducting its business in the state where the suit is brought, be reached by the process of the court, and subjected to its authority. The presence in the case of a Federal right asserted by the plaintiff ought not to prejudice him, and does not, I think, alter the fact that the controversy is one of which a circuit court may take cognizance, because it is a controversy between citizens of different states."

Justice Harlan also differed from the court on other grounds. He contended that, to start with, the complaint should have been made to the Interstate Commerce Commission, where the question would almost certainly have been once for all settled. "This, I think, is all that need have been said; for, whatever interpretation was given to the judiciary act of 1888 . . . the circuit court would have been required, under the case just cited [B. & O. R. Co. v.

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United States, 215 U. S. 481], to decline jurisdiction. But the court, in its wisdom, does not refer to this view of the case, and deems it necessary to determine whether the plaintiffs, citizens of Georgia, may, under the judiciary act of 1888, considered alone, invoke the jurisdiction of the circuit court, held in that state, against the defendant corporations of other states."

This quotation shows sufficiently well the grounds of Justice Harlan's dissent. Since the Interstate Commerce Commission had been established for the express purpose of passing upon such a contention as this, he saw no reason why all jurisdiction other than that should not have been excluded and the case remanded for determination there. The court was uselessly contending for something that was not necessarily to be considered, and avoiding that which made the case very simple. Nevertheless, he proceeded to reply to the contentions of the court, and to show that a wiser interpretation of the act would have been to allow the suit to be brought into the federal court at the home of the plaintiff as well as at that of any of the corporations.

It may appear that the cases just considered turn on questions of statutory construction rather than of constitutional right. They are, however, significant as evidencing the strong desire on the part of Justice Harlan to secure to the individual when possible the right of resort to federal courts.

The Meaning of Federal Immunity.—There are two very significant cases in which Justice Harlan differed from the court in its interpretation of what constitutes an immunity guaranteed by the Federal Constitution. They are Tullock v. Mulvane, 184 U. S. 497, and Bailey v. Alabama, 211 U. S. 452. The first involved the constitutionality of a decree of a state court which had given to a defendant the attorney's fees, in addition to damages for losses incurred by the unlawful imposition of an injunction issued by the circuit court. The question raised was whether there was a federal question involved such as would give jurisdiction to the federal court. The court, speaking through Justice White, said that there was, but Justice Harlan said there was not.

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The following quotation will give in a general way the contention of the court: "To hold the contrary, as we have previously pointed out, would be but to declare, that although the power conferred by Congress upon this court to adopt equity rules in controlling, nevertheless the interpretations of the rules and limitations which arise from a proper construction of them, as expounded by this court and enunciated in its decisions, are without avail. And this yet further points out the fallacy involved in the contention that the lower court, in passing upon the issues, decided merely a question of general law involving no Federal controversy. Now it is at once conceded that the decision by a state court of a question of local or general law involving no Federal element does not as a matter of course present a Federal question. But, where, on the contrary, a Federal element is specially averred and essentially involved, the duty of this court to apply to such Federal question its own conceptions of the general law we think is incontrovertible."

The decision of the court amounted to this: If there arose a dispute involving the application of law in which a federal right was averred, even though there was no constitutional point involved, and though there was no federal statute covering the case and the matter controlled was one of private relations within the State, yet what the federal court had decided as having had bearing on this point should be given precedence over state law and decisions. As Justice Harlan showed, this was an inadmissible extension of federal authority.

He said: "The claim is that the rules and decisions of the Supreme Court of the United States have the force of legislative declarations; that they enter into, and become a part of, the contract of sureties, who can only be held liable for such consequences as are the direct result of the breach and were within their contemplation at the time the bond was executed. No statute, however, prescribed the conditions of the bond nor limited the extent of liability thereon. It is true that it was within the general equitable power of

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the Federal court to prescribe the conditions upon which the injunction should issue. . . . Being an independent contract, actionable in any state court where service upon the sureties can be obtained, the interpretation of the former applies. . . . They knew that the obligation was enforceable in the courts of the state of which the plaintiff and defendants were all residents, and that the highest court of that state had consistently held that counsel fees were recoverable on an injunction bond. That the bond was given in a Federal court, where a different rule of interpretation obtains, has not been deemed to affect the state court in determining the liability upon such bonds when suit was brought thereon. . . .

"Suppose this court had not, prior to the trial of this case, expressed any opinion upon that question of general law. Could it then have been contended that the judgment complained of denied any Federal immunity? If not, then the Federal immunity now claimed arises entirely from the failure of the state court to take the same view of a question of general law which this court took in prior cases between other parties. There has been a wide difference of opinion between this court and some of the state courts upon questions of general law. But it has never been supposed that anyone has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a state court to accept those views as denying him an 'immunity' existing or belonging to him in virtue of an 'authority exercised under the United States.'"

From a study of this decision it is very difficult to ascertain exactly what federal immunity the judge was defending. He was very positive in asserting that on the very face of the case a federal immunity was involved, but he was obscure in indicating exactly what that immunity was. The more clearly, however, the matter in dispute is brought into the foreground, the more certain it is that there was in fact no federal immunity. Justice Harlan showed that there had been many cases decided to the contrary, and

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that even the decisions cited by the court do not, if properly interpreted, give precedent for the present decree.

This case illustrates how far at times the court will go in order to discover a federal question. The next case for discussion shows how hard it is, at other times, for the court to see a federal question when it would seem to be very evident. Justice Harlan, of course, dissented from the latter also,—Bailey v. Alabama, 211 U. S. 452. The case came from the supreme court of Alabama, to review a decision denying relief by habeas corpus. The decision was rendered by Justice Holmes, and may be summarized as follows: The plaintiff in error was committed for detention on a charge of having obtained fifteen dollars with the intent to defraud his employer. The contention was that a colored man had by a statute of Alabama been deprived of his liberty without due process of law, and had been subjected to involuntary servitude.

The nature of the statute in question was this: If any one borrowed money in advance on a written contract for labor, a fine of double the amount borrowed was to be imposed upon the borrower if he refused to perform the work which he had agreed to perform. Half of the amount of the fine went to the State, and the other half went to the employer as a repayment of the amount lost. The following was the contested stipulation in the statute: "And the refusal of any person who enters into such contract to perform such act or service or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord, or to defraud him."

The plea was set up that this statute made it possible, by the advancing of small amounts of money to persons in need, to prevent such persons from making free labor contracts. The fact that the non-performance of the work contracted for was to be taken on prima facie evidence of his intent to defraud made it impossible for the person, by working elsewhere, to pay the debt. Hence the plea was made that this was involuntary servitude.

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The case was thrown out of court because of the way in which the plaintiff proceeded. The ruling was that because the plaintiff had sued out a writ of habeas corpus for discharge in advance of his trial in the lower state court, he had not taken the proper procedure to have his case determined by the Supreme Court. This was termed a "short cut" by the court, and because of this short cut the question asked could not be answered.

Such a grave injustice aroused Mr. Harlan. He recognized, however, that if this procedure had taken place in a lower federal court and the case had been appealed, the writ of habeas corpus would have been denied. But since this was a procedure in the state courts from the first, and since the supreme court of the State had overlooked this flaw in procedure, that fact once and for all settled the point of procedure in the lower state court. All that the Supreme Court was to decide, and had a right to decide, was the constitutionality of the statute. In other words, Justice Harlan contended that the Supreme Court exceeded its jurisdiction in passing upon the procedure in state courts, particularly when the supreme court of the State from which the case came had not questioned it.

"If the accused," he said, "in advance of his trial, had sought a discharge on a writ of *habeas corpus* sued out from *a circuit court of the United States,* that might have been deemed a 'short cut.' For it is well established that, 'in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' the courts of the United States will not, except in certain cases of urgency, and in advance of his trial, discharge, upon *habeas corpus,* one who is alleged to be held in custody by the state, in violation of the Constitution or the laws of the United States. . . . But whether the accused, in seeking his dis-

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charge by the state court, adopted a mode of procedure authorized by the local law, was for the Alabama courts, not for this court, to determine. The state court recognized the proceeding by *habeas corpus* to be in accordance with the local law; for the supreme court of Alabama, without even intimating that the accused took a 'short cut,' or pursued the wrong method to obtain his discharge, entertained his appeal and passed upon the constitutionality of the statute under which he was held in custody."

Without going further into this subject, it is readily seen, from these two cases, if the court wishes to see a federal question, how little excuse is necessary to find one, but if the court wishes to find otherwise, how much it takes to make the court pass upon the constitutionality of a question. With Justice Harlan it was not so. With him, if there was a federal question to be decided, it was the court's duty to pass upon it. If, on the other hand, there was none, he did not think it the duty of the court to manufacture one.

Equity Competence.—The case of Thompson v. Allen County, 115 U. S. 550, is an interesting illustration of Justice Harlan's desire to have the United States circuit court enforce its decree. Here was involved the issue by a county, in due legal form, of bonds as subscription to stock in a railroad company. The county court had been empowered by the State to appoint a tax collector to collect the tax levy to meet the interest on the coupons as it came due. The whole county was opposed to this tax levy, and practically everybody refused to pay. No one could be found by the county court who would undertake the duty of collecting taxes to meet the obligations which the county clearly owed. The circuit court issued a mandamus directed to the county court to have the taxes collected to meet the debt of the county. When the reply came that no one could be found to collect the taxes, suit was instituted to force the tax payers individually to pay the taxes in court for the purpose of meeting the interest due on the bonds. The circuit court held that the collection of taxes was not a judicial function, and

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upon this point the case was sustained by the Supreme Court.

The language of the court on this point is as follows: "No such power has ever yet been exercised by a court of chancery. The appointment of its officer to collect taxes levied by order of a common-law court is as much without authority as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common-law court can compel the *assessment* of a tax, it is quite as competent to enforce its *collection* as a court of chancery. Having jurisdiction to compel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. The sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery."

Justice Harlan differed from the court both as to the collection of this tax being an assumption by the court of an executive function, and as to the ability of the circuit court to put into effect its mandamus by collecting the tax itself.

After citing several cases to show that such had not before been necessarily deemed an assumption of an inappropriate function, he said: "The bill does not ask the court to usurp the function of *levying* the taxes. That duty has been performed by the only tribunal authorized to do it, viz.: the County Court of Allen County. Nothing remains to be done, except to collect from individuals specific sums of money which they are under legal obligations to pay. The collection of these sums will not interfere with any discretion with which the Allen County Court is invested by law; for, by its own order, made in conformity with the law of the State, and by judgment in the *mandamus* proceedings, the sums due from the individual defendants, and from other taxpayers, have been set apart for the payment of Thompson's judgments. Those sums, when thus collected cannot be otherwise used. As the county court cannot find any one who will accept the office of special collector, and

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as the parties agree that there is no mode of collecting the sums set apart in the hands of the individual defendants and other tax payers, for the payment of Thompson, I am unable to perceive why the circuit court sitting in equity, may not cause these sums to be applied in satisfaction of its judgments at law. . . . With money in their hands, equitably belonging to the judgment creditor, they walk out of the court whose judgments remain unsatisfied, announcing in effect, that they will hold negotiations only with a 'special collector' who has no existence.

"That the court below, sitting in equity—after it has given a judgment at law for money, and after a return of *nulla bona* against the debtor—may not lay hold of moneys, set apart, *by the act of the debtor,* in the hands of individuals *exclusively for the payment of that judgment,* and which money, the parties agree, cannot be otherwise reached than by being brought into that court under its orders, is a confession of helplessness on the part of the courts of the United States that I am unwilling to make."

Amount in Dispute.—The question of the amount in dispute necessary for the Supreme Court to review decisions below has given rise to some very interesting discussions. The disputes, however, have not centered so much around the amount itself as around the constitutional points involved. Two cases illustrate this assertion, Linford v. Ellison, 155 U. S. 503, and Giles v. Harris, 189 U. S. 475.

The case of Linford v. Ellison involved the validity of an ordinance of the city of Kaysville, Utah. This ordinance levied a tax on land which, though incorporated within the city, was so far from the settled portions as not to be benefited by incorporation. A person having refused to pay the assessment made upon him, the tax collector levied and sold a wagon, to obtain the amount of fifty dollars to satisfy the assessment. The contention was made that inasmuch as the tax was levied upon one who received no benefit from the city, such a tax took property without due process of law.

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The Supreme Court decided, among other things, that since the city had acted within authority granted by Congress in establishment of the territory of Utah, and since the constitutionality of no statute of Congress was involved, and since the damages did not amount to $5000, the decision of the territorial court would stand. The language of the court on this point is as follows: "It is thus seen that the decision of the supreme court of the territory involved the construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature; but that the validity of that authority and of the statute was not drawn in question. In order to give us jurisdiction of this appeal, the matter in dispute exclusive of costs must have exceeded the sum of $5,000, or else, without regard to the sum or value in dispute, the validity of a patent or copyright must have been involved, or the validity of a treaty or statute of or an authority exercised under the United States have been drawn in question."

Justice Harlan thought that the question should have been answered regardless of the amount in dispute. The question had been asked whether property had been taken without due process of law, and it was for the court to answer it. "We have jurisdiction to review the judgment or decree of the supreme court of a territory, without regard to the sum or value in dispute in any case in which is 'drawn in question the validity of . . . an authority exercised under the United States.'" Since "the validity of the authority given by the territorial legislature, acting under the United States, to tax agricultural lands like those belonging to the plaintiff, was directly drawn in question and was passed upon by the court of original jurisdiction," the question should have been answered.

In concluding, he said: "It seems to me that if a case in a territorial court turns upon the validity of an act which is authorized by a statute of the territorial legislature deriving its existence and powers from the United States, and if that statute is itself drawn in question as being repug-

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nant to the Constitution of the United States, then we have a case in which is 'drawn in question the validity of . . . an authority exercised under the United States.'"

It may appear that this case involves primarily the construction of a statute, but underneath can be seen Justice Harlan's desire that the court shall determine the point of due process of law, and the desire to extend the jurisdiction of the Supreme Court as far as possible to acts of subordinate authorities in territories.

It has been seen how, in Bailey v. Alabama, Justice Holmes, by calling the procedure undergone by the plaintiff a short cut, denied to the colored man rights supposed to be secured to him under the Constitution of the United States. In Giles v. Harris occurs a similar situation. In this case, however, the court assumed jurisdiction and considered the merits of the case, but did not pass upon the constitutional point involved.

The case involved the provisions in the constitution of Alabama which had been so applied as to deny to the negroes the right to vote. The case was brought into the circuit court of the United States, and was dismissed for want of jurisdiction. Hence an appeal was taken to the Supreme Court. The dismissal from the circuit court was on the ground that damages were averred to be not two thousand dollars.

The Supreme Court admitted that the circuit court did not have jurisdiction as the record read, but rather than remand for a revision of the record, the court waived the pecuniary considerations and proceeded to decide the merits of the case. It decided that equity could not give relief, for the plaintiffs would have been forced by the court to be registered under a statute which they themselves said was unconstitutional. In the second place, it said that if the whole of the white population of Alabama desired to deprive the colored men of their votes, a decision to the contrary would not remedy the situation. But the court did not answer the question of the constitutionality of the

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provisions of the Alabama constitution, one of the express averments of the case.

Justice Harlan differed from the court because it discussed the merits of the case at all. He held that since the case was not properly before the circuit court in that the record did not show the averment of damages amounting to two thousand dollars, the question of damages could not rightly be waived by the Supreme Court and the case decided upon its merits. In that connection he said: "It seems to me that this question as to the value of the matter in dispute was sufficiently raised in the circuit court; for the demurrer to the bill was, in part, on the ground that the facts stated did not make a case 'within the jurisdiction of the court.' But, passing that view, I come to a more serious matter. In cases of which a circuit court may take original cognizance, the value of the matter in dispute—which is mentioned in the statute in advance of any reference to the nature of the subject of the action—is as essential to jurisdiction as is the nature of the subject of such dispute. And yet the court says that an objection that the record from the circuit court does not show an allegation as to value is unavailing here, even if such allegation ought to have been made. That is a new, and I take leave to say, a startling doctrine. Must not this court, upon its own motion, decline to pass upon—indeed has this court, strictly speaking, jurisdiction to consider and determine—the merits of a case coming from the circuit court, unless it *affirmatively* appears *from the record* that the case is one of which that court could take cognizance? Is not a suit presumably without the jurisdiction of a circuit court, unless the record shows it to be one of which that court may take cognizance? Is it of any consequence that the parties did not raise the question in the circuit court? If the record shows nothing more than that the case arises under the Constitution and laws of the United States, and if it does not affirmatively appear in some appropriate way, that the value of the matter in dispute is up to the required amount, has this court

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jurisdiction to consider and determine the merits of the case?"

In concluding he said: "My views may be summed up as follows: 1. This case is embraced by that clause of the act of 1887–88 which provides that the circuit court shall have original cognizance 'of all suits of a civil nature . . . where the matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000, and arising under the constitution or laws of the United States.' 2. That the sum or value of the matter in dispute in such cases is jurisdictional under the statute. 3. That, as it did not appear from the record, in any way, that the matter in dispute exceeded in value the jurisdictional amount, the circuit court could not take cognizance or dispose of it on its merits. 4. That least of all does this court have jurisdiction to determine the merits of this case. 5. That when a case comes here upon a certificate as to the jurisdiction of a circuit court, this court may not forbear to decide that question, and determine the merits of the case upon a record which does not show jurisdiction in the circuit court." He added, however, "that it is competent for the court to give relief in such cases as this."

There is one characteristic in all of Justice Harlan's dissents on the ground of the jurisdiction of courts, namely, the desire to see justice done to the individual. If a person had been wronged in one court, and there was constitutional reason for having the case taken into another court and there dealing out justice to the individual, he was unwilling that the letter of the law should stand in the way. These cases well refute the accusation that has often been made against him that he stood for the letter rather than the spirit of the law.

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CHAPTER VII

Miscellaneous Topics

Bearing of the Fourteenth Amendment upon the First Eight Amendments.—Justice Harlan held, with regard to the fourteenth amendment, a doctrine which few seem to have supported. According to him, the provisions of the fourteenth amendment made the first eight amendments limitations upon the States as well as upon the United States. Since by the fourteenth amendment no State could abridge the privileges and immunities of citizens of the United States, no State could deny anything guaranteed in the first eight. These provisions had previously been considered privileges and immunities as opposed to the power of the national government. Since, therefore, the fourteenth amendment forbade the abridgment by the States of the privileges and immunities of citizens of the United States, it forbade the abridgment by them of those secured to the citizens by the first eight amendments.

In O'Neil v. State of Vermont, 144 U. S. 323, Justice Harlan, dissenting, expressed the following sentiment: "I fully concur with *Mr. Justice Field,* that since the adoption of the 14th Amendment, no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of states. The Constitution was ratified in the be-

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lief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, articles of amendment would be submitted to the people, recognizing those essential rights of life, liberty, and property, which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country."

In Maxwell v. Dow, 176 U. S. 581, Justice Harlan spoke even more vehemently for this principle. A man had been tried, convicted of robbery, and sentenced to eighteen years' imprisonment, by a jury of eight persons. The case was taken by writ of error from the supreme court of the State of Utah on the plea that the section of the constitution of that State which allowed trial by jury of less than twelve, was unconstitutional in that it deprived citizens of the United States of privileges and immunities secured to them by the Constitution of the United States.

The court, speaking through Justice Peckham, denied this claim. The main precedent cited was that established in the Slaughter House Cases, 16 Wall. 36, where it was developed "that there was a citizenship of the United States and a citizenship of the states, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of citizens of the United States that were placed by the amendment under the protection of the Federal Constitution, and that the privileges and immunities of a citizen of a state, whatever they might be, were not intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested."

Justice Harlan, however, dissenting, said: "It does not solve the question before us to say that the first ten Amendments had a reference only to the powers of the national government, and not to the powers of the states. For, if, prior to the adoption of the Fourteenth Amendment, it was one of the privileges or immunities of citizens of the United

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States that they should not be tried for crime in any court organized or existing under national authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime, particularly for an infamous crime, by eight jurors, when the Amendment expressly declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'? . . .

"If the court had not ruled otherwise, I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no state should make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, the People of the United States put upon the states the same restrictions that had been imposed upon the national government in respect, as well of the privileges, and immunities of citizens of the United States, as of the protection of the fundamental rights of life, liberty, and property.

"The decision to-day rendered is very far-reaching in its consequences. I take it no one doubts that the great men who laid the foundations of our government regarded the preservation of the privileges and immunities specified in the first ten Amendments as vital to the personal security of American citizens. To say of any people that they do not enjoy those privileges and immunities is to say that they do not enjoy real freedom. . . .

"But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any state striking down guaranties of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the revolutionary period universally claimed as the birthright of freemen."

It is seen from the above that Justice Harlan's doctrine rested on a basis deeper than mere logic. The principles

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stated in the first ten amendments were to him sacred elements of liberty, and he naturally opposed any decision that gave to the States a constitutional right to abridge those principles. He was not willing that the States individually should be left to determine whether their citizens had been deprived of any of the fundamental rights of freedom.

In Patterson v. Colorado, ex rel. Atty. Gen., 205 U. S. 454, Justice Harlan again asserted this doctrine in the following words: "I go further and hold that the privilege of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press."

In Twining v. New Jersey, 211 U. S. 78, as late as the year 1908, Justice Harlan asserted the same doctrine: "At the close of the late Civil War, which had seriously disturbed the foundations of our governmental system, the question arose whether provision should not be made by constitutional Amendments to secure against attack by the *states,* the rights, privileges, and immunities which, by the original Amendments, had been placed beyond the power of the United States or any Federal agency to impair or destroy. Those rights, privileges, and immunities had not then, in terms, been guarded by the national Constitution against impairment or destruction by the states, although, before the adoption of the 14th Amendment, every state, without, perhaps, an exception, had, in some form, recognized, as part of its fundamental law, most, if not all, the rights and immunities mentioned in the original Amendments, among them immunity from self-incrimination."

Direct Taxation.—It will be interesting from the standpoint of history to make a short study of Justice Harlan's

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dissent in the case of Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 158 U. S. 601, wherein he differed from the court as to the meaning of direct taxation. As is well known, the court has not been uniform in its decisions as to what constitutes direct taxation. At first it was thought that only capitation taxes and taxes on real estate were direct taxes, but in the case under consideration it was declared that taxes on income from real estate and from personal property are direct taxes.

As the case was tried when, owing to the sickness of one of the justices, there were only eight sitting, and as the judges were equally divided on various aspects of the case, a rehearing was granted. At the first hearing the court ruled that the law in question, so far as it levied a tax on the rents or income of real estate, was in violation of the Constitution and invalid. But the judges were divided equally on the following points: "1. Whether the void provision [as to rents and income from real estate] invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?" Upon the rehearing the case was decided affirmatively on each of the above points. Justice Harlan dissented from the whole decision of the court. His full doctrine was brought out in his dissent in the final hearing of the case.

His first condemnation of the decision was based upon the court's disloyalty to the doctrine of stare decisis. After recalling that there had been much difference of opinion in the constitutional convention as to exactly what constituted a direct tax, he showed that it had been decided in Hylton v. United States, 3 Dall. 171, that nothing except taxes upon real estate and capitation taxes constitutes direct taxes, and therefore that in asserting that taxation upon income from real estate or personal property was direct taxation the court departed from the accepted doctrine. Many other

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cases were cited to develop this argument. He said: "It seems to me that the court has not given to the maxim of *stare decisis* the full effect to which it is entitled. While obedience to that maxim is not expressly enjoined by the Constitution, the principle that decisions, resting upon a particular interpretation of that instrument, should not be lightly disregarded where such interpretation has been long accepted and acted upon by other branches of the government and by the public, underlies our American jurisprudence. . . . While, in a large sense, constitutional questions may not be considered as finally settled, unless settled rightly, it is certain that a departure by this court from a settled course of decisions on grave constitutional questions, under which vast transactions have occurred, and under which the government has been administered during great crises, will shake public confidence in the stability of the law."

"I have a deep, abiding conviction," he continued, "which my sense of duty compels me to express, that it is not possible for this court to have rendered any judgment more to be regretted than the one just rendered. . . . In my judgment a tax on *income* derived from real property ought not to be, and until now has never been, regarded by any court as a direct tax on such property within the meaning of the Constitution. . . . And, in view of former adjudications, beginning with the *Hylton case* and ending with the *Springer case,* a decision now that a tax on income from real property can be laid and collected only by apportioning the same among the states, on the basis of numbers, may, not improperly, be regarded as a judicial revolution, that may sow the seeds of hate and distrust among the people of different sections of our common country."

Though the above quotation might seem to indicate that Justice Harlan did not look at the economic meaning of a direct tax, the following will show that he was not unaware of this consideration: "In determining whether a tax on income from rents is a direct tax, within the meaning of the

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Constitution, the inquiry is not whether it may in some way indirectly affect the land or the landowner, but whether it is a *direct* tax *on the thing taxed, the land.* The circumstance that such a tax may possibly have the effect to diminish the value of the use of the land is neither decisive of the question nor important. While a tax *on the land* itself, whether at a fixed rate applicable to all lands without regard to their value, or by the acre or according to their market value, might be deemed a direct tax within the meaning of the Constitution as interpreted in the *Hylton case,* a duty on rents is a duty on something distinct and entirely separate from, although issuing out of, the land."

In the next place, Justice Harlan proceeded to show how much more unreasonable was the decision that income from tangible personal property should not be subject to a tax by the national government under a rule of uniformity than was the decision regarding income from real estate. "When direct taxes are restricted to capitation taxes and taxes on land, taxation, in either form, is limited to subjects always found wherever population is found, and which cannot be consumed or destroyed. They are subjects which can always be seen and inspected by the assessor, and have immediate connection with the country and its soil throughout its entire limits. Not so with personal property."

Furthermore, he upbraided the court for this decision because of the practical results to be expected from it regardless of former adjudications. "Why do I say that the decision just rendered impairs or menaces the national authority? The reason is so apparent that it need only be stated. In its practical operation this decision withdraws from national taxation not only all incomes derived from real estate, but tangible personal property, '*invested* personal property, bonds, stocks, investments of all kinds,' and the income that may be derived from such property. This results from the fact that by the decision of the court, all such personal property and all incomes from real estate and personal property, are placed beyond national taxation

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otherwise than by *apportionment* among the states *on the basis* simply *of population*. No such apportionment can possibly be made without doing gross injustice to the many for the benefit of the favored few in particular states. Any attempt upon the part of Congress to apportion among the states, upon the basis simply of their population, taxation of personal property or of incomes, would tend to arouse such indignation among the freemen of America that it would never be repeated. When, therefore, this court adjudges, as it does now adjudge, that Congress cannot impose a duty or tax upon personal property, or upon income arising either from rents of real estate or from personal property, 'including invested personal property, bonds, stocks, and investments of all kinds,' except by apportioning the sum to be so raised among the states according to population, it *practically* decides that, *without an amendment of the Constitution*—two thirds of both Houses of Congress and three fourths of the states concurring—such property and incomes can never be made to contribute to the support of the national government."

In closing he said: "The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless."

The question as to what is in fact a direct tax is impossible of solution. The court had already hit upon two things that were as nearly direct taxes as anything could be, and there the matter should have rested. The effect of the decision was to make necessary an amendment to the Constitution of the United States.

Ex Post Facto Laws.—The case of Hawker v. New York,

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170 U. S. 189, shows what Justice Harlan conceived to be an ex post facto law. The case arose because of the denial to a physician, by a statute of the State of New York, of the right to practice medicine. The doctor had been convicted of the crime of abortion and sentenced to a term of ten years in the penitentiary. He had served his term and was again engaged in practice when the State passed a statute providing that no one who had been convicted of felony should practice medicine. The doctor was arrested and was fined two hundred and fifty dollars for treating a patient, and this case was taken by way of appeal to the Supreme Court of the United States upon the plea that the later statute was an ex post facto law.

The court held that law valid, and said: "The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation, of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of the violation to be determined according to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?"

To Justice Harlan this argument was unconvincing. His claim was that if the previous law had stipulated as a part of the punishment of felonies that a physician should not thereafter practice medicine, the denial of the privilege to Hawker would not have been ex post facto. But since he had suffered the penalty imposed by the State for the crime committed, any additional punishment inflicted for the same offence would be ex post facto. "If the statute in force when the offense of abortion was committed had provided that, *in addition* to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practice medicine, no one, I take it, would doubt that such prohibition was

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a part of the *punishment* prescribed for the offense. And yet it would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offense of 1877 and which by its own force, made it a crime for defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in 1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the Constitution of the United States declaring that no State shall pass any *ex post facto* law."

Justice Harlan also urged the fact that the offender might have become a different sort of man after serving in prison and therefore be well suited to practice medicine. But that point seems to be wide of the mark. It has an important ethical consideration, but could have no bearing upon an ex post facto law as such, for the State would have been denying this opportunity of reform if it had been a part of the punishment of the crime from the beginning that a physician guilty of felony should not again practice medicine.

But it might be argued that the first contention was well founded. It depends upon whether the law is considered simply as a provision to insure suitable characters for the practice of medicine. That is a legitimate police measure, within the power of the State. If the law be looked upon merely as instituting a punishment, it must be admitted that Justice Harlan was contending correctly that the law was an ex post facto law, for the statute in question not only operated as a punishment for crime after it had been committed, but also after the man had been punished to the full extent of the law as it existed at the time of the commission of the crime.

Copyrights.—The Constitution of the United States gives Congress the power to pass laws promoting science and useful arts by means of patents and copyrights. Under the statutes regulating copyrights a very amusing case came up from the United States circuit court for the district of

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Kentucky.[1] This court had decided that certain copies of pictures of dancing girls from advertisements of the Wallace circus were not protected by the laws regulating the production of useful arts. The case having been appealed to the Supreme Court, the decision of the lower court was reversed.

The following quotation from the decision, rendered by Justice Holmes, will show the ground of the reversal: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyrights would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—and it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hope for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff's right."

These words sound almost sublime, but it must be admitted that they become ludicrous when used in connection with a bill-board advertising circus dancing girls. And that is the substance of Justice Harlan's dissent. "The clause of the Constitution giving Congress the power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive use of their respective work and discoveries, does not, as I think, embrace a mere advertisement of a circus."

[1] Bleistein v. Donaldson Lith. Co., 188 U. S. 239.

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Self-Incrimination.—In Twining v. New Jersey, 211 U. S. 78, the court held that freedom from self-incrimination is not one of those privileges secured to citizens by the due process of law clause of the fourteenth amendment. In dissenting Justice Harlan criticized the court's refusal to determine whether self-incriminatory evidence had been demanded. A question of so much import, he said, should not be decided unless it is necessary in order to decide the case: "As a reason why it takes up first the question of the power of a state, so far as the Federal Constitution is concerned, to compel self-incrimination, the court says that if the right here asserted is not a Federal right that is an end of the case, and it must not go further. It would, I submit, have been more appropriate to say that, if no ground whatever existed, under the facts disclosed by the record, to contend that a Federal right had been violated, this court would be without authority to go further and express its opinion on an abstract question relating to the powers of the states under the constitution."

But Justice Harlan further contended that if the court had found that the right had been violated it should have pronounced the act of the State unconstitutional, because, in the first place, he believed that the privileges and immunities of citizens of the United States which were secured against state action by the fourteenth amendment included also those enumerated in the first eight; and in the second place, even if this were not true, a proper interpretation of the phrase "due process of law" includes freedom from self-incrimination. In this connection he said: "In my judgment, immunity from self-incrimination is protected against hostile state action, not only by that clause in the 14th Amendment declaring that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' but by the clause, in the same Amendment, 'nor shall any state deprive any person of life, liberty, or property, without due process of law.' No argument is needed to support the proposition that,

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whether manifested by statute or by the final judgment of a court, state action, if liable to the objection that it abridges the privileges or immunities of national citizenship, must also be regarded as wanting in the due process of law enjoined by the 14th Amendment, when such state action substantially affects life, liberty, or property."

The Insular Cases.—Justice Harlan did not render a separate dissenting opinion in the earlier of the Insular cases. His concurrence in the dissent by Chief Justice Fuller in Downes v. Bidwell, 182 U. S. 244, however, showed that he was opposed to the differentiation made by the court, namely, that which placed the power of Congress over the insular possessions in certain respects above the Constitution of the United States. The case of Hawaii v. Mankichi, 190 U. S. 197, contains the substance of his whole doctrine regarding the relation of the United States to the newly acquired territory.

The question at issue in Hawaii v. Mankichi was whether the Constitution in full force had been extended to the Hawaiian Islands by the joint resolution of Congress annexing them. The opinion of the court in this case was very hotly opposed by Justice Harlan, Chief Justice Fuller, and Justice Peckham. The majority opinion was rendered by Justice Brown, and concurring opinions were submitted by Justices White and McKenna. Thus it is seen that the court was sharply divided.

The case came up for review from the United States district court for Hawaii, which had discharged on habeas corpus a man convicted of manslaughter because he had been convicted by a verdict of only nine of the twelve jurors. The decision of the lower court was that such conviction was not in accordance with the guarantee by the Constitution of the United States of trial by jury, in that according to the American law the jury must agree unanimously on their verdict. The laws of Hawaii allowed such a procedure, and thus was raised the question whether the Constitution of the United States extended with full force

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over the Hawaiian Islands after their annexation to this country.

The decision of the court in this case was based upon the idea that the intention and not the letter of the law is the law. "'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' . . . There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice, when such interference would result in imperiling the peace and good order of the islands."

It is seen that the argument of the court was based upon the meaning of the resolution, that is, whether it intended to extend to the islands all of the privileges and rights secured by the Constitution. This question Justice Harlan said could not be raised. He contended that it is not for Congress to say whether the Constitution is to operate in territory which had been incorporated within the jurisdiction of the United States. If it is constitutional for Congress to admit territory by joint resolution, well and good, but there is where the power of Congress stops. Any attempt to allow in the territories acts which are unconstitutional must be void.

He said: "In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to those islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the government of Hawaii accepted the joint resolution of 1898, by a formal transfer of its sovereignty to the United States—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States—every human being in Hawaii, charged with the commission of crime there, could have rightly insisted that neither his life nor his liberty could be taken as a punishment for

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crime, by any process, or as a result of any mode of procedure that was inconsistent with the Constitution of the United States. Can it be that the Constitution of the United States is the supreme law in the states of the Union, in the organized territories of the United States, between the Atlantic and Pacific Oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in the territories and among the people situated as were the territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves would place Congress above the Constitution. . . .

"I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or an indictment of a grand jury, and by the unanimous verdict of a petit jury. 2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated, or forbade the enforcement of, any municipal law of Hawaii, so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law."

One other quotation will be to the point: "I stand by the doctrine that the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by

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mere nonaction, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority and only by the authority of the United States. Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution full of restrictions upon Congress, and designed to limit the separate departments of government to the exercise of only expressly enumerated powers and such other powers as may be implied therefrom,—each department always acting in subordination to that instrument as the supreme law of the land. Indeed, it has been announced by some statesmen that the Constitution should be interpreted to mean, not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution. Nor can I approve of the suggestion that the status of Hawaii and the powers of its local government are to be 'measured' by the resolution of 1898, without reference to the Constitution. It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid."

These sentiments were reasserted in dissenting in the cases of Dorr v. United States, 195 U. S. 138, and Trono v. United States, 199 U. S. 521. Since, however, the views expressed in his opinions there were substantially the same as those expressed in the case of Hawaii v. Mankichi, they need not be discussed further.

Interstate Comity.—Though the question of interstate comity is a broad one, the points wherein Justice Harlan differed from the court have not been numerous. The case of Chambers v. Baltimore and Ohio R. Co., 207 U. S. 142, is the only one that needs to be considered. In this case was involved the right of a citizen of Pennsylvania, the widow of a fireman on the Baltimore and Ohio Railroad, who was also a citizen of Pennsylvania, to sue in an Ohio court. Suit had been brought in the lower court and dam-

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ages amounting to $3000 had been allowed. But this decision had been reversed by the supreme court of the State of Ohio, on the ground that the plaintiff could not sue in the Ohio courts because of a statute of Ohio which prevented it. Whereupon the case was appealed to the Supreme Court of the United States upon the ground that the statute was in violation of the clause of the federal Constitution which provides that "the citizens of each State shall be entitled to all privileges and immunities in the several States."

The court upheld the statute on the ground that it did not make any discrimination against citizens of other States. "The courts were open in such cases to plaintiffs who were citizens of other states if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another state. So far as the parties to the litigation are concerned, the state, by its laws, made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other states which it allowed to its own."

Justice Harlan differed from the court in that it presumed to interpret the statute for itself instead of considering the law as it stood under the interpretation of the state court. The state court had expressly said that if the plaintiff had been a citizen of the State of Ohio the damages would have been held valid. "That there may be no mistake as to the decision, I quote the official syllabus of the present case, which, by the law of Ohio, is to be taken as indicating the point actually in judgment: 'No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, *except* where the person wrongfully killed was a *citizen of the state of Ohio.*' . . .

"In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, travelling together on a railroad in Pennsylvania, should be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed by its statute against

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any suit for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the state where the death occurred the widow or estate of each decedent would have, in the latter state, a valid cause of action. . . .

"With entire respect for the views of others, I am constrained to say that in my opinion, so much of the local law, whether statutory or otherwise, as permits suits of this kind for damages where the deceased was not a citizen of Ohio, is unconstitutional."

Thus it is seen that Justice Harlan would have been more strict than the court was in its interpretation of the clause of the Constitution which secures interstate comity. There is also seen another instance of his desire to secure legal remedies to the individual.

Labor Legislation.—Under the head of labor legislation it is necessary to refer to some cases which are not primarily concerned with constitutional law. From Justice Harlan's dissents from these cases may be gathered a general impression of his attitude regarding the relation of the Constitution to labor reform.

The case of New England R. Co. v. Conroy, 175 U. S. 323, presents a very interesting dispute between Justice Harlan and the court as to the meaning of a fellow-servant. Justice Harlan contended that the conductor should have been looked upon as the representative of the railroad company on the trains, and that all of his subordinates were responsible to the company through him, when by pronouncing the conductor a fellow-servant with a brakeman the Court exempted the railroad company from damages which a jury had granted. "In my judgment," he said, "the conductor of a railroad train is the representative of the company in respect of its management, all the other employees on the train are his subordinates in matters involved in such management, and for injury received by any one of those

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subordinates during the management of the train by reason of the negligence of the conductor the railroad company should be held responsible."

Again, in Baltimore and Ohio Southwestern R. Co. v. Voigt, 176 U. S. 498, when the Supreme Court declared that an express messenger could not be termed a passenger, and hence could not receive damages for injuries sustained in a wreck, Justice Harlan dissented. He contended that such persons ought not to be excluded from that class of persons who could recover damages for injuries received while working on trains. He said: "I am of opinion that the present case is within the doctrines of *New York C. R. Co. v. Lockwood,* and that the judgment should be affirmed upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business, whereby injury comes to any person using its cars, with its consent for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial."

This natural sympathy for the employee or laborer, which was evidenced in the two cases just mentioned, came out in full force in his dissent from Lochner v. New York, 198 U. S. 45. Here the Supreme Court held invalid a law of New York which attempted to limit the hours of employment of bakers to ten hours a day. The court declared that such legislation was "an arbitrary interference with the freedom to contract guaranteed by the 14th Amendment which cannot be sustained as a valid exercise of the police power to protect the public health, safety, and morals, or general welfare." In a somewhat lengthy dissent from this case Justice Harlan undertook to prove by quotations from various sociological and medical authorities that the trade of a baker had a tendency to shorten the lives of those engaged in it.

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He dissented again from the case of Howard v. Illinois Central R. Co., 207 U. S. 463, when the court declared unconstitutional the federal employers' liability act of June 11, 1906. While he did not think that this act could apply to intrastate commerce, he contended that it should have been declared effective for injuries which could be shown to have occurred in interstate commerce.

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CHAPTER VIII

Judicial Legislation

It is particularly interesting to note the fact that the first and last dissenting opinions which Justice Harlan delivered were on the subject of judicial legislation. And there is no marked difference in the tone of these opinions, except that the first contained the firmness and positiveness of a middle-aged man, while the last contained the uneasiness and solicitude of an old man. In the first was a clear and definite respect for legislation as it read, in the last was a spirited condemnation of society for looking to the court to correct legislation. While the first was directed only to the court, the last was broader and contained a sting for any one who desired to extend the power of the court beyond its duly recognized judicial power. The first case was that of United States v. Clark, 96 U. S. 37, the last cases were the Standard Oil Company and American Tobacco Company decisions, 221 U. S. 1 and 106. Many times between these are found reassertions of the same sentiment.

Discussion of Cases.—The case of United States v. Clark will bear emphasis not only because it stands in direct relation to our subject, but also because it was Justice Harlan's first dissenting opinion. The case came up from the court of claims of the United States. A man named Clark, who was paymaster in the northern army during the Civil War, claimed that he had been robbed of the sum of $15,978.87. The questions at issue were whether Clark could be allowed to testify in his own behalf as to the amount stolen, and whether he was excluded from the court of claims anyway because he had waited too long to bring suit.

The first point made by the counsel for the United States, namely, that the plaintiff could not be allowed to testify in his own behalf, was easily overruled by asserting that though

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the claimant's testimony could not be accepted as valid testimony, "it may be proper as corroborative" of the alleged amount. The other contention on the part of the counsel for the government was as easily disposed of by asserting that the right of the claimant did not accrue until the accounting officers had held him liable for the sum lost. By this interpretation the suit was brought within the time allowed.

Justice Harlan approved of neither of these rulings. He thought that the judgment of the court of claims should have been reversed, with an order that the case be dismissed. Referring to the first point, he said: "In all 'Courts of the United States' parties may testify, but in the *Court of Claims* no plaintiff can testify against the United States in support of his claim or right. So reads the statute; and it is, I submit, the duty of this court to obey it, leaving to Congress to make such changes in the rules of evidence in the Court of Claims as its views of public policy may suggest. It may be unfortunate for Clark if he be denied an opportunity to testify as to the amount of his loss; but, as said by Lord Campbell, *Ch. J.*, 'It is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.'" He said further: "With entire respect for the opinion of my brethren, I submit that the construction which the court places upon the Act of June 25, 1868, seems to fall very little short of judicial legislation."

He referred to the second point in the following words: "Clark, in order to obtain relief from responsibility on account of the alleged robbery, was required to present to the proper accounting officers a decree of the Court of Claims, directing that he should receive credit for the amount taken from him by robbery. It was not, therefore, a misuse of words for Congress to describe a demand for relief under the Act of 1866 as a 'claim.' If a 'claim,' it was clearly barred by the Act of 1863, unless it be true as suggested in the opinion of the court that the claim did not accrue

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until the credit which Clark had given himself in his report of the robbery was rejected at the Treasury in 1871; but, unquestionably, his crediting himself with the amount taken from him by the robbery was an unauthorized act. The accounting officers could not, except in pursuance of a decree of the Court of Claims, lawfully allow such a credit; and their failure to promptly disallow it did not give Clark any additional right, nor deprive the Government of any right which it possessed. Neither his nor their action could suspend the running of the Statute of Limitations. His claim, therefore, accrued immediately upon the passage of the Act of May 9, 1866. Not having been asserted by suit within six years from that date, it was barred."

It has not been thought necessary to explain the meaning of the various acts referred to which established and laid down rules for the conduct of trials in the court of claims. It is sufficiently evident that the stipulation was made that the claim had to be set up within six years after it accrued, and that the court quibbled over what is meant by a claim in order to prevent that stipulation from debarring the suit. It is also evident that Justice Harlan thought that the quibble of the court was unjustified.

This case is typical as illustrating Justice Harlan's conception of the position which the court should occupy in our government. If any case could have arisen which would have called for the sacrifice of his conviction on this subject, this case certainly would have had that effect. He himself had been a commander in the northern army. Here was a paymaster of that army, from whom fifteen thousand dollars had been stolen, but so far as a proper interpretation of the law went, he had to lose that amount. If anything would have aroused Justice Harlan's sympathy this loss on the part of a fellow soldier should certainly have done so, and it doubtless did. But he recognized the necessity of having the court interpret the law for the general good of the nation. His conviction as to the integrity of the law was a higher conviction than that one unfortunate man should

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not suffer. The case, however, does not argue that he put the letter of the law above the spirit of it. Other cases where a possible interpretation would allow the individual to be benefited show the reverse as to his manner of approaching a decision. But since the letter and the spirit both in this case called for a different interpretation, he held that it should have been interpreted differently.

In following out the course of Justice Harlan's utterances on this matter, brief references only will be necessary in most cases. It was found that in the Civil Rights Cases, 109 U. S. 3, he thought that the court had no right to declare what was appropriate legislation for the enforcement of the thirteenth and fourteenth amendments. He said: "Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress as appropriate legislation and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate; that is, best adapted to the end to be attained. The judiciary may not with safety to our institutions enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a co-ordinate department, which, if often repeated, would work a radical change in our system."

In Pollock v. Farmers' Loan and Trust Co., 158 U. S. 601, Justice Harlan spoke as follows: "It was said in argument that the passage of the statute imposing this income tax was an assault by the poor upon the rich, and by much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of Socialism. With the policy of legislation of this character, the court has nothing to do. That is for the legislative branch of the government. It is for Congress to determine whether the necessities of the government are to be met, or the interests of the people sub-

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served, by the taxation of incomes. With that determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern. The safety and permanency of our institutions demand that each department of government shall keep within its legitimate sphere as defined by the supreme law of the land. We deal here only with questions of law."

In Robertson v. Baldwin, 165 U. S. 275, a similar utterance is found: "It will not do to say that by 'immemorial usage' seamen could be held in a condition of involuntary servitude, without having been convicted of crime. The people of the United States, by an amendment to their fundamental law, have solemnly decreed that 'except as a punishment for crime, whereof the party shall have been duly convicted,' involuntary servitude shall not exist in any form in this country. The adding of another exception by interpretation simply, and without amending the Constitution, is, I submit, judicial legislation. It is a very serious matter when a judicial tribunal, by the construction of an act of Congress, defeats the expressed will of the legislative branch of government. It is a still more serious matter when the clear reading of a constitutional provision relating to the liberty of a man is departed from in deference to what is called usage which has existed, for the most part, under monarchical and despotic governments."

As was seen in Hawaii v. Mankichi, 190 U. S. 197, Justice Harlan accused the court of so interpreting an act of Congress that it amounted to the passage by that body of an act which it could not constitutionally pass, and gave a meaning to it which Congress clearly did not intend that it should have. He said: "The opinion of the court contains observations to the effect that some persons, heretofore convicted of crime in the Hawaiian courts, will escape punishment if the joint resolution of 1898 is so interpreted as to make Congress mean what, it is conceded, the words 'contrary to the Constitution of the United States' naturally import. In the eye of the law that is of no consequence.

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The cases cited by the court fall far short of sustaining the proposition that the court may reject the plain, obvious meaning of the words of the statute in order to remedy what it deems an omission by Congress. The consequences of a particular construction may be taken into account only when the words to be construed are ambiguous."

In the case of Houghton v. Payne, 194 U. S. 88, there is a characteristic dissent by Justice Harlan. Houghton, Mifflin and Company, publishers of the Riverside Literature Series, thought that they were treated wrongly in having these publications termed third-class matter, because, in spite of the fact that each volume was complete in itself, the volumes were issued periodically. For sixteen years the post-office department had interpreted the portion of the statute of Congress bearing on this point to mean that the Riverside Series were periodicals instead of books. Several attempts had been made to get Congress to amend the statute, but all had failed. Postmaster-General Payne, however, deliberately classed the Riverside Series as third-class matter, and the rate was changed accordingly. The publishers brought suit to have the action of Payne pronounced invalid. This the lower court refused to do, and upon appeal to the United States Supreme Court the decision below was sustained. The court reasoned as follows: "While it might well happen that by reason of the relative unimportance of the question when originally raised a too liberal construction might have been given to the word periodical, we cannot think that if this question had been raised for the first time after second class mail matter had obtained its present proportions, a like construction would have been given. Some considerations in connection with the revocation of these certificates may properly be accorded to the great expense occasioned by this interpretation, and the discrimination in favor of certain publishers and against others, to which allusion has already been made. We regard publications of the Riverside Literature Series as too clearly within the denomination of books to justify us in approving

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a classification of them as periodicals, notwithstanding the length of time such classification obtained."

Justice Harlan, with whom concurred the Chief Justice, thought that the court exceeded its power in this case and did what amounted to amending an act of Congress. His language on this point is as follows: "In our judgment, the appellants properly construe the statute. We think it obviously means just what the Department held it to mean for more than sixteen years. But the very utmost that the government can claim is that the statute in question is doubtful in meaning and scope. The rule in such a case is not to disturb the long continued practice of the Department in its execution of a statute, leaving to Congress to change it when public interests require that to be done. But the Department, after being informed repeatedly by Congress that the change asked by Postmasters General would not be made, concluded to effect the change by a mere order that would make the statute mean what the practice of sixteen years, and the repeated action of Congress had practically said it did not mean and was never intended to mean. This is a mode of amending and making laws that ought not to be encouraged or approved." This dissent was typical of Justice Harlan. He thought that it was improper thus to burden a publication that put the best literature so cheaply into the hands of the people when there were sufficient constitutional grounds for not doing so.

In the cases of the Standard Oil Company v. United States, 221 U. S. 1, and United States v. American Tobacco Co., 221 U. S. 106, much of the action of the court was not necessary for the decision of the case. Instead of doing the simple thing, the court went out of its way to show that a combination was unreasonable when it could have merely pronounced it in restraint of trade.

When we read Justice Harlan's dissenting opinion from the case of United States v. E. C. Knight Co., 156 U. S. 1, and note how many times he uses the words "unreasonable" and "undue" as modifiers of the phrase "restraint of trade,"

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we wonder why he objected to the use of the words in the Standard Oil decision. On deeper inspection, the reason for this objection becomes evident. If the court had simply said that the restraint was an "unreasonable" restraint of trade without affirmative comment upon the necessity of the word being in the statute, it is doubtful whether Justice Harlan would have dissented at all. It was the manner in which the word was employed that he disliked. The word was added after considerable weighing of the wording of the statute and lengthy investigation into the meaning and methods of regulating monopolies. And it must be further noted that Congress had long remained silent after a dissenting opinion of the same judge had suggested that the word be supplied. This fact argued to Justice Harlan's mind that Congress meant that the word should not be supplied.

The following quotation will show the court's argument in the Standard Oil case: "And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had

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not brought about the wrong against which the statute provided."

As has been seen, Justice Harlan in his dissent in the Standard Oil case first condemned the court for dwelling at length on a point which did not need to be dwelt on in order to decide the case. He then entered upon some generalizations as to the evil effects to be expected by such action on the part of the court. He said: "I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress,—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by '*judicial legislation*,' read words into the anti-trust act not put there by Congress, and which, being inserted, gives it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend legislative enactments*."

The following assertions may almost be looked upon as parting words from a great judge to his country. "After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone

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of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States —the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. . . . The supreme law of the land, which is binding alike upon all,—upon Presidents, Congresses, the courts and the people,—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all."

Justice Harlan's Idea of the Position of the Court.—Since the position of judges in the interpretation of laws gives rise to so much discussion, it is well to consider this whole question. An attempt will be made to ascertain how far Justice Harlan's doctrine on this matter came from the position which it is evident that judges ought to occupy. There is much uncertainty on this point in the mind of the public. A person will condemn the court today for not reading into the law a meaning which he desires to see there, and tomorrow he will condemn it more severely for reading into the law a meaning which he did not want to see there. How far, therefore, if at all, should the judges try to meet this public approval or disapproval? Thus is opened up the whole question of judicial legislation.

There are practically two arguments presented, and both are presented on either side of the question. The first, stated affirmatively, is that the very act of interpretation itself implies judicial legislation; stated negatively, it is that interpretation, properly speaking, does not imply judicial legislation. The second argument is that the failure of the

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court at times to legislate judicially gives rise to adverse criticism and weakens the power of the court. But this same argument is presented on the other side, with a like comment that a continued exercise of judicial legislation may in time even destroy the power of the courts. These conceptions cover practically the whole field.

The word interpret used in a legal sense has two meanings: first, "the setting forth of a fixed or certain meaning, discoverable by a purely intellectual process"; and secondly, the setting forth "of a meaning which is indeterminate or uncertain."[1] The former is called analytical interpretation, and the latter selective interpretation. According to those who uphold judicial legislation, the latter is of far greater importance. It arises when the courts are called upon to decide the bearing of the law upon cases which the legislative did not have in mind when the law was passed. "The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[2]

Thus the necessity of judicial legislation arises. When unforeseen circumstances come up, and when there is a law in existence which the courts can stretch to apply to such cases, they do it. This is known as selective interpretation, and amounts, in the long run, to judicial legislation, for in the course of time the law may become so much changed that by reading the statute in the light of existing circumstances the original purpose of the law is changed.

Some persons who have observed this necessity have concluded that since the court changes laws it in fact legislates, and it should be frankly admitted that it is the body that

[1] Editorial, "Genuine and Spurious Interpretation," in the Green Bag, vol. xxv, p. 505.
[2] J. C. Gray, The Nature and Sources of the Law, Sec. 370.

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makes laws. Without going deeply into this matter, the simple assertion will suffice that an open assumption on the part of the courts that they may, when they find it necessary, make laws to suit their purposes would be a dangerous enlargement of the power of the courts. The fact that the judges must argue that what they are doing is not legislating, but only applying laws already made, keeps them from extending their power over any sphere that undoubtedly belongs to the legislature.

On the other hand, when the assertion is made that interpretation properly speaking does not imply judicial legislation, one has in mind especially analytical interpretation—a discovery of the meaning of the law by purely intellectual processes. Strictly speaking, those holding to this theory believe that the law can be made in advance of every case to be determined. All that the courts need to do is to find out the facts in the case and say what the law directs for that case. Their judgment is to be mechanical, and judges are merely experts applying legal formulas to cases, and lose sight of all other considerations.

But this is not the conception that modern jurisconsults hold when they assert that interpretation should not mean judicial legislation. They recognize the fact of legal fictions and the necessity of judge-made law through slow processes, but they oppose any quick and intentional change in a statute on the part of the court. In other words, they do not hold that judges should openly and avowedly perform judicial legislation, or that they should underhandedly argue that what is clearly judicial legislation is within the meaning of the statute. They do not object to the slowly evolving judge-made law, developed from necessity. The latter is finding law to meet exigencies, the former is changing the law to suit the convenience of the judge. With them, finding the law is indicative of a great judge, but changing the law is indicative of arrogance.

To which of these classes did Justice Harlan belong? At the outset it must be admitted that there is no evidence

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that he thought deeply of judicial legislation as a legal concept. His assertions were spontaneous, and if they show him to belong to the class of great judges, it will be all the more in his favor. It will class him as an unconscious artist in that regard.

Reference will need to be made chiefly to the first and last cases studied under the head of judicial legislation. Did the case of United States v. Clark show him to be a great or an inferior judge? No doubt Clark might have suffered hardship had the case been decided according to Justice Harlan's view. But was that hardship one that the judges could properly have remedied? The meaning of the statute was clear. It was evident that if the law applied, Clark's claim would not have been absolved. But since the law on its face was written to exclude such a case, and since it was impossible so to read the statute that it would except him, the law should have been upheld. Congress could have remedied such a situation. There was no excuse for the failure of the court to see in the statute what was really there. And to say the least, this case does not show Justice Harlan to be an inferior judge. It shows loyalty to the Constitution and the firmness necessary in the upholding of the steadiness of the law. Many exceptions of this nature would make the law weak-kneed.

The case of United States v. Clark, however, is rather an exceptional one. There is only one other case,[8] as far as I know, where Justice Harlan opposed leniency to the individual. When it was possible for him to argue that the law allowed relief from hardship, he held to that interpretation. As has been pointed out in various places throughout this study, he practically always endeavored to relieve the suffering individual, but his sense of truth kept him from saying that a law was not what it clearly was. But in the case of the Standard Oil Company v. United States there were none of those exigencies which demanded judicial leniency. Certainly the Standard Oil Company needed

[8] United States v. Jung Ah Lung, 124 U. S. 621.

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no such protecting care. If there was any real exigency, it was that condition which the phrase "restraint of trade" described. The public feeling which the legislators were seeking to put into law was prompted by the hardship brought upon individuals by the monopolies. If there were any exigencies that demanded leniency they were certainly not on the part of the Standard Oil Company.

Justice Harlan did not stand for the strict letter of the law; he stood for legality. In the case of Louisiana v. Mayor, etc., of New Orleans he showed this by desiring that a judgment against the city be termed a contract. Strict letter said that it was not a contract, but legality said that the city was liable to the plaintiff. This case is typical of many. If the law could be found to cover the case, he believed in deciding that way. But if a law could be found which was expressly different from what the judges wanted it to be, he contended that the latter should hold exactly as it was meant. He believed that Congress should supply the laws, and that the courts should interpret them, and he used interpretation in the liberal sense. He did not wish to stop legal fictions, but he did wish to see judges impartial.

The second argument proposed need not be discussed, except to say that mere criticism of a judicial decision seemed not to be of great concern to Justice Harlan. With him the criticism for bad law had to be thrown on the legislators. Since words have meanings, and since legislators have the power of using words and sentences in their proper relation, he thought that legislators could make laws to fit certain circumstances. If a circumstance arose to which the law applied, it was the duty of the court to apply and enforce the law as the legislators had made it. It must be remembered that the best way to get rid of a bad law is to have it enforced by the courts. Since that is true, Justice Harlan's doctrine that a law should be enforced exactly as the legislators meant it to be enforced is a sound one.

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